TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted] 299

MICHIGAN CENTRAL RAILROAD COMPANY, PETITIONER,

vs.

MARK OWEN AND COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

PETITION FOR CERTIORARI FILED APRIL 5, 1921.

CERTIORARI AND RETURN FILED MAY 16, 1921.

(27,622)

(27,602)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 847.

MICHIGAN CENTRAL RAILROAD COMPANY, PETITIONER,

vs.

MARK OWEN AND COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from municipal court of Chicago	2	2
Caption	3	2
Præcipe for summons	5	3
Statement of claim	5	3
Summons and return	8	4
Appearance for defendant	10	6
Order postponing trial	11	6
Finding and judgment	12	7
Order approving bond	15	8
Bond on appeal	17	9
Stipulation as to bill of exceptions	19	10
Bill of exceptions	21	11
Stipulation as to facts	21	11
Exhibit A—Extracts from rules	25	13
B—Extracts from Morris' exceptions	26	15
1—Bill of lading	27	15
2—Bill of lading	28	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1920.

	Original.	Print.
Exhibit 3—Bill of lading	29	15
4—Bill of lading	30	15
Propositions of law	31	16
Judge's certificate to bill of exceptions	34	18
Præcipe for record	36	18
Clerk's certificate	37	19
Transcript from appellate court	38	20
Assignment of errors	38	20
Clerk's certificate	39	21
Order assigning case for hearing	43	22
Order taking case under advisement	44	23
Judgment	45	23
Order allowing appeal	47	24
Order filing decision	48	24
Order approving bond	49	25
Bond on appeal	50	25
Clerk's certificate	52	26
Assignment of errors	53	26
Order taking case under advisement	55	27
Opinion	56	28
Judgment	62	32
Order denying rehearing	63	33
Clerk's certificate	64	34
Writ of certiorari and return	65	35

1 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of October, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, Within and for the State of Illinois.

Present:
Frank K. Dunn, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered, that to wit, on the 15th day of September, A. D. 1919, the same being one of the days in vacation before the term of Court aforesaid, transcript of proceedings had in the Municipal Court of Chicago and the Appellate Court of the First District were filed by appellant, Michigan Central Railroad Company, a corporation, in the office of the Clerk of the Supreme Court, which records are in the words and figures following, to wit:

2 24407, 12978.

82.

Transcript of Proceedings.

The Municipal Court of Chicago.

Fees $4.00.

Frank P. Danisch, Clerk.

Praecipe Record to Appellate Court from the Municipal Court o Chicago.

Gen. No. 626,589.

MARK OWEN & COMPANY

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation.

Transcript of Proceedings.

Frank P. Danisch, Clerk.

Filed Appellate Court, Jun- 17, 1918. James S. McInerney, Clerk
Filed Sept. 15, 1919. Chas. W. Vail, Clerk Supreme Court.

3 UNITED STATES OF AMERICA.
State of Illinois, County of Cook,
City of Chicago, ss:

In the Municipal Court of Chicago.

Pleas, proceedings and judgments before the Municipal Court o Chicago, held in the City of Chicago, in the County of Cook an State of Illinois, at the places in the First District in said city pr vided by the corporate authorities of said city for the holding o said Court, in the year of our Lord one thousand nine hundred an eighteen, and the Independence of the United States the one hu dred and forty-second.

Present:
Honorable Leo J. Doyle, One of the Judges of the Municip Court of Chicago.
Maclay Hoyne, State's Attorney.
Anton J. Cermak, Bailiff.

Attest: FRANK P. DANISCH,
Clerk.

Be it remembered, to-wit: that on the seventh day of March, A. D. 1918, the following among other proceedings were had in said Court and entered of record therein, to-wit:

No. 626,589. Contract.

MARK OWEN & COMPANY

vs.

MICHIGAN CENTRAL RAILROAD CO., a Corporation.

4 Be it remembered, that to-wit: on the 25th day of October, A. D. 1917, a certain Præcipe and Statement of Claim was filed in the office of the Clerk of the Municipal Court, in words and figures following to-wit:

5 STATE OF ILLINOIS,
City of Chicago,
First District, ss:

In the Municipal Court of Chicago.

Contract No. 626,589.

Claim for $40.00

MARK OWEN & COMPANY

vs.

MICHIGAN CENTRAL RAILROAD CO., a Corporation.

To the Clerk:

Please issue a summons returnable at 9:30 A. M. sharp, on the 2nd day of November, 1917.

Statement of Claim.

Plaintiff alleges:

Plaintiff alleged that its claim is for money damages for loss and damage to several shipments of, to-wit, four car lots of grapes shipped as follows, to-wit:

4,291 baskets of grapes, *to* property of said plaintiff, shipped in car F. G. E. 28732, in sound and merchantable condition from Lawton, Michigan, on or about September 24, 1915, to Chicago, Illinois, via said defendant lines. On receipt of said shipment a bill of lading was issued.

1,506 baskets of grapes, the property of said plaintiff, shipped in car F. G. E. 22049, in sound and merchantable condition from via said defendant lines. On receipt of said shipment a bill of lading was issued.

6 1,630 baskets of grapes, the property of said plaintiff, shipped in car P. R. R. 102566, in sound and merchantable condition from Lawton, Michigan, on or about November 1, 1915, to Chicago, Illinois, via said defendant lines. On receipt of said shipment a bill of lading was issued.

1,466 baskets of grapes, the property of said plaintiff, shipped in car P. F. E. 5586, in sound and merchantable condition from Paw Paw, Michigan, on or about October 12, 1914, to Chicago, Illinois, via said defendant lines. On receipt of said shipment a bill of lading was issued.

Said damage being incurred by reason of the failure on the part of said defendant to use and exercise the care required of it as a common carrier of the said shipments while in its possession, custody and control, and by reason, to-wit, of not properly transporting the said shipments in safe and proper equipment, and by reason, to-wit, of the failure on the part of said defendant as a common carrier to deliver to said plaintiff at Chicago the same number of baskets of grapes as were given said defendant for transportation thereby causing a loss as follows, to-wit:

To loss of 126 baskets of grapes from said shipment, $23.30.

W. B. MOULTON AND
J. A. BATES,
Attorney for Plaintiff.

1206 Borland Bldg., Chicago, Business or Residence Address.

7 Be it remembered, that afterwards on the same day, to-wit, the 25th day of October, A. D. 1917, a certain writ of summons was issued out of the office of the Clerk of said Municipal Court, under the seal thereof, directed to the Bailiff of said Court, to execute, which writ, together with the return of the Bailiff thereon endorsed, were and are in the words and figures following, to-wit:

8 STATE OF ILLINOIS,
City of Chicago,
First District, ss:

The People of the State of Illinois to the Bailiff of the Municipal Court of Chicago, Greeting:

We command you that you summon Michigan Central Railroad Company, a corporation, if it shall be found in the First District of the City of Chicago, personally to be and appear before the Municipal Court of Chicago, in the City Hall, in the City of Chicago, at 9:30 A. M. sharp, on the 2nd day of November, A. D. 1917, to answer unto Mark Owen & Company in its claim in the sum of Forty Dollars.

And have you then and there this Writ with an endorsement thereon in what manner you shall have executed the same.

Witness Frank P. Danisch, Clerk of our said Court, and the seal thereof, at Chicago, aforesaid, this 25th day of October, A. D. 1917.

[SEAL.] FRANK P. DANISCH,
Clerk.

Notice.

Any defendant wishing information as to what steps it may be necessary for him to take for the purpose of making a defense, may obtain the same by making inquiry at the Clerk's office.

The attention of the Defendant is also called to the following provisions of the Municipal Court Act:

Section 43. That upon the return of any such summons duly served upon the defendant, the plaintiff shall be entitled to judgment as in case of default, unless the defendant shall either appear in person at the time specified in such summons, or shall file his appearance in writing in said Municipal Court at or before the time fixed in such summons for his appearance. In case any defendant appears in person and desires to make defense to the suit, the Court shall cause him to sign and file a written appearance. Upon such default the Court shall assess the damages after hearing such
9 evidence as the Court may deem sufficient for that purpose. In case the defendant shall desire upon the trial to present any set-off or counter claim, he shall file a statement thereof with his appearance: Provided, however, the Court may, in its discretion, extend the time for the filing of such statement. It shall be the duty of the Court at half past nine o'clock A. M., sharp, of each day upon which the court is open for business, or as soon thereafter as is practicable, to call or cause to be called, the cases in which the defendants are then required to appear in person or to file their appearances in writing and in which the appearances in writing of the defendants have not been filed, and to give, or cause to be given, such direction with respect to such appearances as the Court may find necessary or proper for the information of the parties.

Section 44. That the clerk of the Municipal Court shall keep on hand and furnish to suitors and attorneys an application printed blank forms of præcipes, summonses, entries of appearance, affidavits, bonds, attachment writs, replevin writs, petitions for changes of venue, and all other necessary papers for the use of the parties to suits in such courts. Forms for such papers shall be prescribed by the Chief Justice of the Municipal Court, who shall also, from time to time, prescribe and cause to be printed forms of statements of claims to be used in said court.

Section 45. That if, in any case of the fourth class or in any case of the fifth class mentioned in said section two (2) of this Act, brought in The Municipal Court, the defendant shall appear at the time specified in the summons, or shall have entered his appearance in writing at or before the time so specified, the Court shall, at such time, or as soon thereafter as practicable, fix a time for the trial thereof, and such case shall be tried at the time so fixed, or as soon thereafter as the other business of the Court will permit.

(Endorsed upon the back of said writ of summons is the following:)

Served this writ on the within named Michigan Central Railway Company, a corporation, by delivering a copy thereof with a Præ-

cipe and statement of claim and affidavit attached thereto to S. H. Strawn, Agt. of said corporation and at the same time informing him of the contents thereof in the City of Chicago, this 26th day of October, 1917. The President, Clerk, Secretary, Superintendent, Cashier, Principal, Director, Engineer, Conductor or any other agent of said corporation not found in the City of Chicago.

ANTON CERMAK,
Bailiff.

By LOUIS RAGO,
Deputy.

10 Be it remembered, that to wit: on the 29th day of October, A. D. 1917, a certain Appearance was filed in the office of the Clerk of the Municipal Court, in words and figures following to wit:

STATE OF ILLINOIS,
City of Chicago, ss:

In the Municipal Court of Chicago.

Class 4th, No. 626,589.

MARK OWEN AND COMPANY

vs.

MICHIGAN CENTRAL RAILROAD COMPANY.

We hereby enter the appearance of Michigan Central Railroad Company, defendant, and that of ourselves as its attorney in the above entitled cause.

WINSTON, PAYNE, STRAWN & SHAW,
Defendant's Attorneys.

11 Be it remembered, that afterwards, to wit: on the First day of March, A. D. 1918, the following among other proceedings were had and entered of record in said Municipal Court, which proceedings were and are in words and figures following, to wit:

Present:

Honorable Leo J. Doyle, One of the Judges of the Municipal Court of Chicago.
Maclay Hoyne, State's Attorney.
Anton J. Cermak, Bailiff.
Frank P. Danisch, Clerk.

No. 626,589, Contract.

MARK OWEN & CO.

vs.

MICHIGAN CENTRAL RAILROAD COMPANY.

Now comes the parties to this cause and thereupon this cause comes on in regular course for trial before the Court without a jury, and the trial of this cause is now here entered upon, and after progress therein, said trial being not yet completed, it is ordered that further proceedings in this cause be and they are hereby postponed to 3:00 o'clock P. M. on the 6th day of March, 1918.

12 Be it remembered, that afterwards, to wit: on the seventh day of March, A. D. 1918, the following among other proceedings were had and entered of record in said Municipal Court, which proceedings were and are in words and figures following, to wit:

Present:

Honorable Leo J. Doyle, One of the Judges of the Municipal Court of Chicago.
Maclay Hoyne, State's Attorney.
Anton J. Cermak, Bailiff.
Frank P. Danisch, Clerk.

No. 626,589, Contract.

MARK OWEN & CO.

vs.

MICHIGAN CENTRAL RAILROAD CO., a Corp.

Now come the parties to this cause and thereupon this cause is now here resumed before the Court without a jury and the court having heard the evidence and the arguments of counsel and being fully advised in the premises enters the following finding, to wit:

"The Court finds the issues against the Plaintiff."

Now comes the Plaintiff in this cause and moves the Court that a new trial of this cause be granted and the Court being fully advised in the premises overrules said motion and denies a new trial of this cause.

13 Now comes the Plaintiff and moves the Court in arrest of Judgment in this cause and the court being fully advised in the premises overrules said motion.

This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the finding herein, that the plaintiff take nothing by this suit and that the de-

fendant have and recover of and from the plaintiff the costs by the defendant herein expended and that execution issue therefor.

Now comes the Plaintiff and prays that an appeal of this cause be granted to the Appellate Court in and for the First District of Illinois which appeal is granted on condition that said party file herein an appeal bond conditioned according to law in the sum of One Hundred and no/100 Dollars, ($100.00) with security to be approved by a Judge of this Court within thirty days (30) from this date.

It is further considered by the court that sixty (60) days be allowed in which to file "Bill of Exceptions" herein.

* * * * * * *

14 Be it remembered, that afterwards, to-wit: on the fifth day of April, A. D. 1918, the following among other proceedings were had and entered of record in said Municipal Court, which proceedings were and are in words and figures following, to-wit:

Present:
Honorable Leo J. Doyle,
One of the Judges of the Municipal Court of Chicago.
Maclay Hoyne, State's Attorney.
Anton J. Cermak, Bailiff.
Frank R. Danisch, Clerk.

No. 626,589, Contract.

MARK OWEN & CO.

vs.

MICHIGAN CENTRAL RAILROAD CO.

Draft Order.

* * * * * * *

15 STATE OF ILLINOIS,
County of Cook,
City of Chicago, ss:

In the Municipal Court of Chicago.

Gen. No. 626,589.

MARK OWEN & CO.

vs.

MICHIGAN CENTRAL RAILROAD CO.

On motion of the plaintiff herein, it is hereby ordered that th Appeal Bond to the Appellate Court in the sum of $100.00, thi

day filed by the plaintiff herein, is hereby approved and ordered filed.

LEO J. DOYLE,
Judge.

Dated April 5th, 1918.

16 Be it remembered, that to-wit: on the 5th day of April, A. D. 1918, a certain Appeal Bond was filed in the office of the Clerk of the Municipal Court, in words and figures following to-wit:

17 Know all men by these presents

That we, Mark Owen and Company and the National Surety Company of the City of Chicago and State of Illinois, are held and firmly bound unto The Michigan Central Railroad, also of the same City and State in the penal sum of One Hundred ($100) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly, by these presents.

Witness our hands and seals, this 4th day of April A. D. 1918.

The condition of the above obligation is such, that whereas, the said Michigan Central Railroad did on the 7th day of March A. D. 1918, in the Municipal Court of Chicago, in the State aforesaid, recover a Judgment against the above bounden Mark Owen and Company for costs of suit; from which said Judgment of the said Municipal Court of Chicago, the said Mark Owen and Company has prayed for and obtained an appeal to the Appellate Court of the First District of the State.

Now therefore, if the said Mark Owen and Company shall duly prosecute its said appeal with effect, and moreover pay the amount of the Judgment, costs interest and damages rendered, and to be rendered, against it in case the said Judgment shall be affirmed in said Appellate Court then the above obligation to be void, otherwise to remain in full force and virtue.

MARK OWEN & CO., [SEAL.]
By H. D. LONG,
Agt. [SEAL.]
NATIONAL SURETY COMPANY. [SEAL.]
JEAN S. HARPER,
Attorney in Fact. [SEAL.]

Approved:
LEO J. DOYLE,
Judge. [SEAL.]

O. K.
WINSTON, STRAWN, SHAW.
Att'ys for Defendant.

18 Be it remembered, that to-wit: on the 30th day of April, A. D. 1918, a certain Stipulation was filed in the office of the Clerk of the Municipal Court, in words and figures following to-wit:

19 STATE OF ILLINOIS,
City of Chicago,
First District, ss:

In the Municipal Court of Chicago.

Contract No. 626,589.

MARK OWEN & CO.

vs.

MICHIGAN CENTRAL RAILROAD CO.

Stipulation.

It is hereby stipulated and agreed to by and between the parties hereto that the original Bill of Exceptions filed herein may be incorporated in the transcript on appeal to the Appellate Court of the First District.

WILLIAM B. MOULTON &
JOSEPH A. BATES,
Attorneys for the Plaintiff.
WINSTON, STRAWN & SHAW,
Attorneys for Defendant.

Dated this 30th day of April, 1918.

20 Be it remembered, that to-wit: on the 30th day of April, A. D. 1918, a certain Bill of Exceptions was filed in the office of the Clerk of the Municipal Court, in words and figures following to-wit:

21 STATE OF ILLINOIS,
City of Chicago,
First District, ss:

In the Municipal Court of Chicago.

Contract No. 626,589.

Filed Apr. 30, 1918. The Municipal Court of Chicago. Frank P. Danisch, Clerk.

MARK OWEN & CO.

vs.

MICHIGAN CENTRAL RAILROAD CO.

Bill of Exceptions.

Be it remembered that on the trial of this cause, on the first and on the seventh day of March, 1918, there was given as the evidence on behalf of the plaintiff and the defendant the facts set forth in a certain stipulation and certain exhibits (Nos. 1, 2, 3, and 4, and A and B), referred to therein. By agreement of both parties, in lieu of the original tariffs referred to in said stipulation as Exhibits A and B, extracts therefrom pertinent to the issues were substituted and introduced in evidence. Copies of said stipulation and of the exhibits introduced in evidence are as follows:

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true on any trial of the above entitled cause and that no evidence on the part of either party shall be admissible, to disprove any of them, but that either party may introduce further additional evidence not contradictory to the facts herein stated to be true.

22 1. It is stipulated and agreed that the documents hereto attached marked Exhibits 1, 2, 3, and 4 are the original bills of lading issued by the defendant covering the shipments mentioned by plaintiff in its statement of claim on cars F. G. E. 28732, F. G. E. 22049, P. R. R. 102,566 and P. F. E. 5586 respectively.

2. It is stipulated and agreed that there was delivered to the defendant by the shipper at Lawton, Michigan, on Sept. 24, 1915, in car 29732, 1221 four-pound baskets of grapes, 3068 eight-pound baskets of grapes and 2 sixteen-pound baskets of grapes; that there was delivered to defendant by the shipper at Paw Paw, Michigan, on October 7, 1914, in car 22049, 1506 sixteen-pound baskets of grapes; that there was delivered to the defendant by the Shipper at Lawton, Michigan, on November 1st, 1915, in car 102566, 1003 eight-pound baskets of grapes, 627 sixteen-pound baskets of grapes,

50 sixteen-pound baskets of pears, 11 barrels of apples and 54 bushels of pears; that there was delivered to defendant at Paw Paw, Michigan on October 12, 1914, in car 5586, 1466 sixteen-pound baskets of grapes; that all of said shipments were consigned to the plaintiff at Chicago, Illinois, as the consignees thereof.

3. It is stipulated and agreed that the value of the eight-pound baskets of grapes contained in car 28732 at time and place of shipment was fifteen cents per basket and that the value of the four-pound baskets of grapes contained in said car was ten cents per basket at time and place of shipment; that the value of the sixteen-pound baskets of grapes contained in car 22049 was twenty-eight cents at time and place of shipment; that the value of the eight-pound baskets of grapes contained in car 102,566 was fifteen cents per basket at time and place of shipment; that the value of the sixteen pound baskets of grapes contained in car 5586 was twenty-four cents per basket at time and place of shipment.

23 4. It is further stipulated and agreed that all of said cars were transported by defendant from their respective points of origin to Chicago, consigned to the plaintiff herein as consignee; that car 28732 arrived in Chicago on September 25, 1915, was placed on a public delivery team track on September 27, 1915, at 8 A. M. o'clock; that notice of arrival and placement of said car was given to the plaintiff herein on September 27, 1915, at 8:45 A. M. o'clock; that plaintiff accepted said car, broke the seals thereon and started to unload it on September 27, 1915, at 9 A. M. o'clock; and that the unloading of said car was completed by the plaintiff on September 29, 1915, at 6 P. M. o'clock; that car 22049 arrived in Chicago on October 8, 1914, was placed on a public delivery team track on October 9, 1914, at 8:00 A. M. o'clock; that notice of arrival and placement of said car was given to the plaintiff herein on October 9, 1914, at 9 A. M. o'clock; that plaintiff accepted said car, broke the seals thereon, and started to unload it on October 9, 1914, at 9:30 A. M. o'clock; and that the unloading of said car was completed by the plaintiff on October 9, 1914, at 6 P. M. o'clock; that car 102566 arrived in Chicago on November 2, 1915, was placed on a public delivery team track on November 3, 1915, at 8 A. M. o'clock; that notice of arrival and placement of said car was given to the plaintiff herein on November 3, 1915, at 11 A. M. o'clock; that plaintiff accepted said car, broke the seals thereon, and started to unload it on November 5, 1915, at 8 A. M. o'clock; and that the unloading of said car was completed by the plaintiff on November 6, 1915, at 6 P. M. o'clock; that car 5586 arrived in Chicago on October 13, 1914, was placed on a public delivery track on October 13, 1914, at 4 P. M. o'clock; that notice of arrival and placement of said car was given to the plaintiff herein on October 13, 1914, at 4:50 P. M. o'clock; that plaintiff accepted said car, broke the seals, thereon, and started to unload it on
24 October 14, 1914 at 8 A. M. o'clock; and that the unloading of said car was completed by the plaintiff on October 15, 1914, at 6 P. M. o'clock.

5. It is further stipulated and agreed that at the time the plaintiff accepted and started to unload each of said cars, every car contained the same number of baskets and pounds of grapes as were received by the defendant in said car for transportation at the point of origin thereof; named herein, and that at said time the doors of each of said cars were sealed with the same seals intact as were placed on them by the defendant when it received said grapes for transportation.

6. It is further stipulated and agreed that the plaintiff received out of car 28732, 3012 eight-pound baskets of grapes, 1214 four-pound baskets of grapes and 2 sixteen-pound baskets of grapes; that plaintiff received out of car 22049, 1275 sixteen-pound baskets of grapes; that plaintiff received out of car 102,566, 979 eight-pound baskets of grapes 50 sixteen-pound baskets of grapes; 11 barrels of apples, and 54 bushels of pears; that plaintiff received out of car 5586, 1458 sixteen-pound baskets of grapes.

7. It is further stipulated and agreed that the tariffs of the defendant hereto attached and made a part hereof, marked Exhibits A and B respectively, were lawfully on file with the Interstate Commerce Commission and in effect at the times all of said shipments moved and were delivered.

Dated this 27th day of February, A. D. 1918.

(Signed) WILLIAM B. MOULTON AND
JOSEPH A. BATES,
Attorneys for Plaintiff.

(Signed) WINSTON, STRAWN AND SHAW,
Attorneys for Defendant.

25

EXHIBIT A.

Extracts from Rules 2, 3 and 4 of Car Demurrage, Charges and Rules, from Tariff I. C. C. No. 4497; Issued February 4, 1914, Effective March 10, 1914.

Rule 2—Free Time Allowed.

(*a*) Forty-eight hours (two days) free time will be allowed for unloading or loading on all commodities.

Rule 3—Computing Time.

NOTE.—In computing time Sundays and legal holidays, (National State and Municipal) will be excluded, except as otherwise provided in paragraph (*a*) of Rule 9. When a legal holiday falls on a Sunday, the following Monday will be excluded.

(*a*) On cars held for loading, time will be computed from the first 7 a. m. after placement on public delivery tracks. (See Rule No. 6.)

(*b*) On cars held for order, time will be computed from the first 7 a. m. after the day on which notice of arrival is sent to consignees.

(*c*) On cars held for unloading, time will be computed from the first 7 a. m. after placement on public-delivery tracks and after the day on which notice of arrival is sent to consignee.

(*d*) On cars to be delivered on any other than public-delivery tracks time will be computed from the first 7 a. m. after actual or constructive placement on such tracks. See Rule 4 (Notification) and rules 5 and 6 (Constructive Placement.)

NOTE.—"Actual Placement" is made when a car is placed in an accessible position for loading or unloading or at a point previously designated by the consignor or consignee.

(*e*) On cars to be delivered on interchange tracks of industrial plants performing their own switching service, time will be computed from the first 7 a. m. following actual or constructive placement on such interchange tracks until return thereto. See Rule 4 (Notification) and rules 5 and 6 (Constructive Placement). Cars returned loaded will not be recorded released until necessary billing instructions are given.

Rule 4—Notification.

(*a*) Consignee shall be notified by carrier's Agent in writing or as otherwise agreed to by carrier and consignee, within twenty-four hours after arrival of cars and billing at destination, such notice to contain points of shipment, car initials and numbers, and the contents, and, if transferred in transit, the initials and numbers of the original car. In case car is not placed on public-delivery track within twenty-four hours after notice of arrival has been sent a notice of placement shall be given to consignee.

(*b*) When cars are ordered stopped in transit the party ordering the cars stopped shall be notified upon arrival of cars at point of stoppage.

26 (*c*) Delivery of cars upon private or industrial interchange tracks, or written notice to consignee of readiness to so deliver, will constitute notification thereof to consignee.

(*d*) In all cases where notice is required, the removal of any part of the contents of a car by the consignee shall be considered notice thereof to the consignee.

Michigan Central Railroad Co.,

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Shipper's No._____

Agent's No._____

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

at Lawton, Michigan, Sept 24, 1915,

from _____ the property described below, in apparent good order except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Carrier (which word is to be understood throughout this bill of lading as meaning any person or corporation in possession of the property under the bill of lading) agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____

to _____ *is in Cents per 100 Lbs.*

If...Times 1st	If 1st Class	If 2nd Class	If 3rd Class	If 4th Class	If 5th Class	If Class A	If Class B	If Class C	If Class D	If Class E	If Special per _____

(Mail Address—Not for purposes of Delivery.)

Consigned to Mark Owen & Co.,

Destination Chicago State of Ill County of _____

Route _____ Car Initial F.G.E. Car No. 28732

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN	
8	SHOE [illegible]				If charges are to be

	2 16 lb Bas Do	32	2.42		
	S.L.C. Chs Gtd				
	1/2 Tank Ice 17.00				
	Exhibit 1				

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$ 17.00

L. Stokes & Sons Shipper. W. S. Barron Agent

Per R.S. Per M

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

27

1

KALAMAZOO, LAKE SHORE & CHICAGO RY. CO., MICHIGAN UNITED TRACTION CO., Lessees.

Shipper's No. _____

Agent's No. _____

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

at Paw Paw, Mich., Oct. 7 19 14,

from _____ the property described below, in apparent good order except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Carrier (which word is to be understood throughout this bill of lading as meaning any person or corporation in possession of the property under the bill of lading) agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____

to _____ *is in Cents per 100 Lbs.*

IF...Times 1st	IF 1st Class	IF 2nd Class	IF 3rd Class	IF 4th Class	IF 5th Class	IF Class A	IF Class B	IF Class C	IF Class D	IF Class E	IF Special per

(Mail Address—Not for purpose of Delivery.) W

Consigned to Mark Owen & Co.,

Destination Chicago State of Ill County of Cook

Route M. C. Car Initial F.G.E. Car No. 22049

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

					here "To be Prepaid."
	S. L. C. Chgs Gtd.				Received $_____ to apply in prepayment of the charges on the property described hereon.
					Agent or Cashier
					Per _____ (The signature here acknowledges only the amount prepaid)
					Charges Advanced: $_____
	Exhibit 2				

Mark Owen & Co., Shipper. W. A. Mumbrue Agent

Per W. A. Aseltine. Per _____

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.) 1

28

MICHIGAN CENTRAL RAILROAD COMPANY.

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Agent's No. _____

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

at Lawton, Mich., Nov. 1, 1915,

from _____ the property described below, in apparent good order except as noted (contents of packages unknown), marked, consigned and destined as indicated below, which said Carrier (which word is

					Charges Advanced: $_____
	Exhibit 3				

L. Stokes & Sons Shipper. W. S. Barron Agent

Per R. S. Per _____

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.) 1

29

case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is

owner's risk and expense or destroyed without compensation.

SEC. 3. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

MICHIGAN CENTRAL RAILROAD COMPANY

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Shipper's No.

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

at Lawton, Mich., Nov. 1, 1915

from

the property described below, in apparent good order except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Carrier (which word is to be understood throughout this bill of lading as meaning any person or corporation in possession of the property under the bill of lading) agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from

to *is In Cents per 100 Lbs.*

IF...Three 1st	IF 1st Class	IF 2nd Class	IF 3rd Class	IF 4th Class	IF 5th Class	IF Class A	IF Class B	IF Class C	IF Class D	IF Class E	IF Special per

(Mail Address—Not for purposes of Delivery)

Consigned to Mark Owen & Co.,

Destination Chicago State of Ill County of

Route Car Initial P.R.R. Car No. 102566

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1003	8 lbs Bsk Grapes			

If charges are to be prepaid, write or stamp

CONDITIONS

SECTION 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

SEC. 2. In issuing this bill of lading this carrier agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

SEC. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

SEC. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

SEC. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or

	54 Bu do			
	11 Bbls. Apples			
	S.L.C. Ghgs Gtd			
	Keep vents open			
	Exhibit 3			

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$_____

L. Stokes & Sons Shipper. W. S. Barron Agent

Per R.S. Per _____

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

1

29

KALAMAZOO, LAKE SHORE & CHICAGO RAILWAY CO.,

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Shipper's No. _____

Agent's No. _____

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

at Paw Paw, Mich Oct. 12 19 14

from _____ the property described below, in apparent good order except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Carrier (which word is to be understood throughout this bill of lading as meaning any person or corporation in possession of the property under the bill of lading) agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____

to _____ *is in Cents per 100 Lbs.*

IF...Times 1st	IF 1st Class	IF 2nd Class	IF 3rd Class	IF 4th Class	IF 5th Class	IF Class A	IF Class B	IF Class C	IF Class D	IF Class E

IF Special per _____

(Mail Address—Not for purposes of Delivery.)

Consigned to Mark Owen & Co.,

Destination Chicago State of Ill. County of _____

Route _____ Car Initial P.F.E. Car No. 5586

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
	1466 Climax Bask Grapes	28570		

If charges are to be prepaid, write or

	Keep vent open				
	Exhibit 4				

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$_____

Fruit Growers Union Shipper. Per _____

W. A. Mumbrue Agent Per _____

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

30

1

EXHIBIT B.

Extract from Morris' Exceptions to Official Classification No. 130-G. I. C. C. No. 406.

Item 1199.

Owners will be required to load and unload freight, in carloads, when carried at carload rates, also L. C. L. shipment of heavy or bulky freight such as cannot be handled by station employees, with the following exceptions:

Applying at Chicago, Ill.

Less than carload shipments of Green Fruit or Vegetables will be loaded or unloaded by this Company without additional charge. Carload shipments of Green Fruit or Vegetables will be received at or delivered to the car door without additional charge for loading or unloading. When owners request carload shipments of Green Fruit or Vegetables sorted in cars or upon station platforms, in lots according to marks or otherwise, for any purpose whatever, this Company will assess 1 cent per 100 lbs. for such sorting service, in addition to the regular transportation charge.

(Here follows bills of lading marked pages 27, 28, 29, 30.)

31 The foregoing was all the evidence introduced on the trial of this cause.

Thereupon the court held certain propositions of law at the request of and in behalf of the plaintiff as follows:

1. The court holds as a proposition of law in this case that a common carrier is liable for all losses of goods which do not arise from the act of God, or the public enemies.

2. The court holds as a proposition of law in this case, that the liability of the defendant railroad as that of a common carrier did not end with the setting of the cars upon the tracks for unloading, until after the plaintiff as consignee had had a reasonable and proper opportunity to remove the contents after notice of the arrival of the cars.

3. The court holds as a proposition of law in this case that the liability of the defendant railroad in the shipments in this case continued to be that of a common carrier after the cars had been set upon the tracks for unloading until the plaintiff as consignee had had a reasonable and proper opportunity to remove the contents thereof.

4. The Court holds that on the submitted evidence in this case cars Nos. FGE 28732-FGE 22049-PRR 102566-PFE 5586 were unloaded by the plaintiff as consignee within a reasonable and proper time after placement on a public delivery track and after the day in which notice of arrival was sent to the consignee.

5. The court holds as a proposition of law in this case that the liability of the defendant railroad company as a common carrier continued after the arrival of the shipments at destination so long as any duty remained to be performed by said defendant as a common carrier.

6. The court holds as a proposition of law in this case that under and by virtue of Item 1199 of Morris' Exceptions to Official
32 Classification No. 130-G, I. C. C.-406 submitted as evidence in this case there was imposed upon the defendant as a common carrier the duty to deliver the shipments of fruits in this case at the car door.

The defendant by its counsel then and there excepted to the holding of each and all of said propositions.

Thereupon the court held certain propositions of law at the request and in behalf of the defendant, as follows:

1. The court holds as a matter of law, that where goods are lost by an interstate carrier holding such goods as a warehousemen no presumption of liability is raised in a suit by a plaintiff to recover damage for such loss by a showing that the goods were in the possession of the carrier as such warehousemen and were not delivered by it.

2. The court holds, as a matter of law, that where goods are lost while an interstate carrier is holding them as warehousemen, the burden is on a plaintiff suing to recover damages for such loss to prove affirmatively that defendant was negligent in taking care of such goods before there can be any recovery.

3. The court holds, as a matter of law that the burden is on the plaintiff in this case to prove affirmatively that the defendant was negligent before there can be any recovery.

4. The court holds, as a matter of law, that the defendant in this case was only liable as a warehousemen at the time the losses complained of occurred.

5. The court holds as a proposition of law that the action of the plaintiff herein in accepting the cars involved in this action and breaking seals thereon and starting to unload said cars, terminated the defendant's liability as a common carrier, and that thereafter defendant was only liable as a warehousemen.

33 The plaintiff by its counsel then and there excepted to the holding of each and all of said propositions.

The defendant by its counsel then and there asked the court to hold the following propositions of law:

6. The court holds as a proposition of law in this case, that the defendant's liability as carrier terminated when the four cars involved in this action were placed on public delivery team tracks and notice thereof given to consignee.

The court, however, refused to hold this proposition of law to which ruling and decision of the court and to its ruling in refusing to hold said proposition the defendant, by its counsel, then and there excepted.

Whereupon the court after argument of counsel entered a finding in said cause in favor of the defendant and against the plaintiff for the costs of said suit, to which action of the court the plaintiff by its counsel then and there excepted.

Whereupon the plaintiff by its counsel moved the court to set aside the finding and grant a new trial of said cause, which motion the court after argument overruled and denied, to which action of the court the plaintiff by its counsel then and there excepted.

Whereupon the plaintiff by its counsel moved the court in arrest of judgment upon said finding, which motion the court denied, to which action of the court the plaintiff by its counsel then and there excepted.

Whereupon the court entered judgment upon the finding against the plaintiff for the costs of the suit, to which action the plaintiff by its counsel then and there excepted.

34 Whereupon the plaintiff by its counsel prayed an appeal in said cause to the Appellate Court of Illinois in and for the First District thereof, which appeal was allowed by the court, upon filing by the plaintiff of a bond of one hundred dollars within

thirty days from the date of said judgment, and the bill of exceptions within sixty days from the date of said judgment.

Thereupon the plaintiff by its counsel moved the court to vacate the judgment entered in said cause, which motion the court after argument of counsel overruled and denied, to which action the plaintiff by its counsel then and there excepted.

Which was all the evidence offered, heard, or received, and all of the proceedings had on the trial of the above cause.

Forasmuch as the foregoing matters do not otherwise appear of record, the plaintiff tenders this transcript to the presiding Judge of said Municipal Court and requests said Judge to sign and place the same on file in the said cause. It is, therefore, certified by the undersigned Judge of the Municipal Court of Chicago that the foretaken and offered on the trial of said cause and the rulings of the going is a full, true, and complete transcript of all the evidence court with respect to said evidence, and a correct statement of such proceedings in said case as said party desired to have reviewed.

Dated 30th day of April, 1918.

LEO J. DOYLE,
Judge of the Municipal Court of Chicago.

Filed Apr. 30, 1918. The Municipal Court of Chicago. Frank P. Danish, Clerk.

O. K.
WINSTON, STRAWN & SHAW,
Att'ys for Deft's.

35 Be it remembered, that to-wit: on the 4th day of May A. D. 1918, a certain præcipe for record was filed in the office of the Clerk of the Municipal Court, in words and figures following to-wit:

36 STATE OF ILLINOIS,
City of Chicago,
First District, ss:

In the Municipal Court of Chicago.

Contract No. 626,589.

MARK OWEN & CO.

vs.

MICHIGAN CENTRAL RAILROAD CO.

Præcipe for Transcript of Record.

The clerk of said court is hereby requested to prepare a transcript of the record in the above entitled cause and certify to the correctness thereof, said transcript to be made up so as to contain—

First. A copy of the process in said cause.

Second. All pleadings filed by the parties.

Third. The judgment rendered by the Court.

Fourth. All orders in said cause.

Fifth. The bill of exceptions in said cause.

Sixth. The appeal bond.

Dated at Chicago this 4th day of May, 1918.

WM. B. MOULTON AND
JOSEPH A. BATES,
Attorneys for Plaintiff.

To Frank P. Danisch.

We hereby consent to the filing of the above præcipe in said cause, and waive all notice of the time of filing.

WINSTON, STRAWN & SHAW,
Attorneys for Defendant.

37 *Certified Transcript of Record.*

STATE OF ILLINOIS,
County of Cook, ss:

I, Frank P. Danisch, Clerk of the Municipal Court of Chicago, in said County and State, and the keeper of the records and files thereof, in the City, County and State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the record in a certain cause (except the bill of exceptions, the original of which is incorporated herein according to law), and incorporated herein by stipulation of the parties, lately pending in said court, wherein Mark Owen & Company, Plaintiff and Michigan Central Railroad Co., a corporation, Defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, aforesaid, this 5th day of June 1918.

FRANK P. DANISCH,
Clerk.

38 In the Appellate Court of Illinois, First District, October Term, 1918.

Term No. —.

General No. —.

MARK OWEN & COMPANY, Appellant,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, Appellee.

Appeal from the Municipal Court, City of Chicago.

Assignment of Errors.

And now comes the said Mark Owen and Company, appellant, by its attorneys, William B. Moulton and Joseph A. Bates, and says that on the record and proceedings and in entering the judgment aforesaid there is manifest error in this, to-wit:

First. The finding of the Court is contrary to the evidence.

Second. The finding of the Court is contrary to the law and the evidence.

Third. The judgment of the Court is contrary to the law and the evidence.

Fourth. The trial court erred in overruling appellant's motion for a new trial.

Fifth. The trial Court erred in overruling appellant's motion in arrest of judgment.

Sixth. The trial Court erred in entering judgment on the finding.

Seventh. The trial Court erred in holding as law in the decision of said cause the written propositions tendered by the appellee herein numbered 3, 4, and 5.

Eighth. The trial Court erred in not rendering judgment in favor of the appellant after having held as law the written propositions of law tendered by the appellant herein numbered 1, 2, 3, 4, 5 and 6.

39

Wherefore, by reason of the above errors, this defendant and appellant prays that the judgment entered in said cause may be reversed.

WILLIAM B. MOULTON AND
JOSEPH A. BATES,
Attorneys for Appellant.

In the Appellate Court, First District, Illinois.

No. 24407.

MARK OWEN AND COMPANY, Appellant,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corportion, Appellee.

Appeal from the Municipal Court of Chicago.

I, James S. McInerney, Clerk of the Appellate Court, within and for the First District of Illinois, and keeper of the records, files and seal thereof, do hereby certify that the Transcript of Record hereto attached and marked 24407 is the original transcript of record filed in said Appellate Court, on the 17th day of June, A. D. 1918, by said Appellant.

In testimony whereof, I have hereunto set my hand and seal of said Court, at Chicago, Illinois, this 11th day of July, A. D. 1919.

[SEAL.] JAMES S. McINERNEY,
Clerk of the Appellate Court, First District, Illinois.

40 12978. 82.

Record from Appellate Court, First District, to Supreme Court.

Nisi Prius Gen. No. 626,589.

Appellate Gen. No. 24407.

Supreme Court Gen. No. 12978.

MARK OWEN & COMPANY, a Corp., Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corp., Appellant.

Filed Sep. 15, 1919. Chas. W. Vail, Clerk of Supreme Court.

41 At a Term of the Appellate Court, Begun and Held at Chicago, on Tuesday, the Fourth day of March, in the year of our Lord One Thousand Nine Hundred and Nineteen within and for the First District of the State of Illinois.

Present:

Hon. Charles A. McDonald, Presiding Justice.
" David F. Matchett, Justice.
" Albert C. Barnes, Justice.
James S. McInerney, Clerk.
Charles W. Peters, Sheriff.

No. 24407.

MARK OWEN AND COMPANY, a Corporation, Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellant.

Appeal from Municipal Court of Chicago.

Be it remembered, That heretofore on the first day of October, A. D. 1918, it being one of the days of said October Term, A. D. 1918, certain proceedings were had in said Court and entered of record in words and figures following to-wit:

42 At a Term of the Appellate Court, Begun and Held at Chicago, on Tuesday, the First day of October, in the year of our Lord One Thousand Nine Hundred and Eighteen, within and for the First District of the State of Illinois.

Present:

Hon. William E. Dever, Presiding Justice.
" William H. McSurely, Justice.
" Jesse Holdom, Justice.
James S. McInerney, Clerk.
John E. Traeger, Sheriff.

Court met pursuant to an adjournment.
Court opened by proclamation.

And afterward, on the 3rd day of October, A. D. 1918, the following proceedings were had and entered of record in said cause, to-wit:

43 October Term, A. D. 1918, Calendar.

In the Matter of the Assignment of Cases to the First Branch Appellate Court, First District, Illinois.

On the Court's own motion it is ordered that the following numbered cases on the October Term Calendar, A. D. 1918, of said Court be and the same are hereby assigned to the First Branch Appellate Court for hearing and determination, to-wit:

103-24407 et al.

And afterwards, on the 17th day of December, A. D. 1918, it being one of the days of the — Term, A. D. 19— of said Court, the following proceedings were had and entered of record in said cause, to-wit:—

44

24407.

MARK OWEN & COMPANY

vs.

MICHIGAN CENTRAL R. R. CO.

Appeal from Municipal.

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on briefs filed.

And afterwards, on the 29th day of April, A. D. 1919, it being one of the day of the March Term A. D. 1919 of said court, the following proceedings were had and entered of record in said cause, to-wit:

45

24407.

MARK OWEN AND COMPANY, Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, Appellant.

Appeal from Municipal Court of Chicago.

On this day came again the said parties and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error; Therefore, it is considered by the court that for that error and others in the record and proceedings aforesaid, the judgment of the Municipal Court of Chicago in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed. And the Court upon the allegations and proofs in the record in this cause contained finds the issues in favor of the appellant (plaintiff below) Mark Owen and Company.

And the Court doth further find that the said appellant (plaintiff below) Mark Owen and Company ought to have and recover of and from the said appellee (defendant below) Michigan Central R. R. Company, its damages by it sustained by reason of the premises. And the Court being now fully advised in the premises doth assess the damages in favor of the said appellant (plaintiff below) Mark Owen & Company, and against the said appellee (defendant below) Michigan Central Railroad Company, a corporation to the

46 sum of twenty three dollars and thirty cents ($23.30).

Therefore it is considered by the court that the said ap-

pellant (plaintiff below) Mark Owen and Company, do have and recover of and from the said appellee (defendant below) Michigan Central Railroad Company, its said damages of twenty three dollars and thirty cents ($23.30) in form as aforesaid by the court assessed, together with its costs by it in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards, on the 13th day of May A. D. 1919, the following proceedings were had and entered of record in said cause, to-wit:

47 No. 24,407.

MARK OWEN AND COMPANY, Appellant,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellee.

Appeal from Municipal Court of Chicago.

The court having considered the petition of appellee praying for an appeal from the order and judgment of this court in said cause to the Supreme Court of the State of Illinois, and the Court being fully advised in the premises are of the opinion, and therefore certify, that this cause involves questions of law of such importance on account of principal and collateral interests involved as that it should be passed upon by the Supreme Court: It is therefore ordered that an appeal be allowed herein to the said Supreme Court on condition that appellee doth within twenty days from this date execute and file in said cause a good and sufficient appeal bond, conditioned according to law, in the penal sum of two hundred*ed* ($200.00) dollars, with surety thereto to be approved by the Court.

CHARLES A. McDONALD,
DAVID F. MATCHETT,
ALBERT C. BARNES,
Justices.

And afterwards, on the same day to-wit: the 13th day of May A. D. 1919, the following proceedings were had and entered of record in said cause, to-wit:

48 In re Publication of Written Decisions of this Court.

It is hereby ordered that the cases, the numbers and titles of which are given below, the written decisions of this Court filed the 29th day of April A. D. 1919 shall be published in full in the Appellate Court Reports.

And the decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions.

24,407, Owen v. Michigan Central R. R. Co. et al.

And afterwards, on the 21st day of April A. D. 1919, the following proceedings were had and entered of record in said cause, to-wit:

49

24,407.

MARK OWEN AND COMPANY, Appellant,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellee.

Appeal from Municipal Court of Chicago.

This day came Michigan Central R. R. Co., by its counsel, and presented its certain Appeal Bond in said cause in the penal sum of two hundred ($200.00) dollars, with National Surety Company, as surety thereto; and the Court, being fully satisfied as to the qualifications of said surety, doth order that said Appeal Bond be, and the same is hereby taken, approved and filed herein.

And afterwards, on the same day, to-wit: the 21st day of May A. D. 1919, an Appeal Bond was filed in said cause, which said bond is in the words and figures following to-wit:

50 Know all men by these presents, That we Michigan Central Railroad Company, a corporation, as Principal, and National Surety Company, a corporation, as surety, of the County of Cook and State of Illinois, are held and firmly bound unto Mark Owen and Company, a corporation, also of the same County and State, in the penal sum of Two hundred ($200.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 20th day of May A. D. 1919.

The condition of the above obligation is such, That whereas, the said Michigan Central Railroad Company did on the 7th day of March A. D. 1917, in the Municipal Court of Chicago, in the State aforesaid, recover a judgment against the said Mark Owen and Company for costs of suit, from which said judgment of the Municipal Court of Chicago, the said Mark Owen and Company prayed for and obtained an appeal to the Appellate Court within and for the First District of said State; and whereas the said Appellate Court did on the 29th day of April A. D. 1919, and at the March Term thereof, A. D. 1919, reverse the judgment of the Municipal Court aforesaid and did render judgment against the above bounden Michigan Central Railroad Company for twenty three and 30/100 ($23.30) dollars and costs of suit, from which order of reversal and judgment of the said Appellate Court the said Michigan Central Railroad Company has prayed for and obtained an appeal to the Supreme Court of the State of Illinois.

51 Now therefore, if the said Michigan Central Railroad Company shall duly prosecute its said appeal, with effect, and

moreover pay the amount of the judgment, costs, interests, and damages rendered, and to be rendered against it, in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

THE MICHIGAN CENTRAL
RAILROAD COMPANY. [SEAL.]
HENRY RUSSEL,
Vice President. [SEAL.]
NATIONAL SURETY COMPANY.
W. HERBERT STEWART,
Attorney in Fact. [SEAL.]

Approved:
CHARLES A. McDONALD.

52 I, James S. McInerney, Clerk of the Appellate Court, in and for the First District, of the State of Illinois and keeper of the records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings of the said Appellate Court in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this twenty-third day of May in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] JAMES S. McINERNEY,
Clerk of the Appellate Court of the First District, Illinois.

53 In the Supreme Court of Illinois, October Term, A. D. 1919.

MARK OWEN AND COMPANY, Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellant.

Appeal from Appellate Court, First District.

Heard there on Appeal from Municipal Court of Chicago, Honorable Leo J. Doyle, Judge Presiding.

Assignment of Errors in the Supreme Court by Michigan — Railroad Company, Appellant Therein.

Now comes Michigan Central Railroad Company, appellant herein, by Winston, Strawn & Shaw, it- attorneys, and says that in the record and proceedings in the above entitled cause in the Appellate Court for the First District, there were and are manifest errors in this, to wit:

1. The Appellate Court for the First District erred in reversing the judgment of the trial court.

2. The Appellate Court for the First District erred in making a finding of the issues in said cause.

3. The Appellate Court for the First District erred in finding the issues in said cause in favor of Mark Owen and Company, appellee herein.

4. The Appellate Court for the First District erred in entering judgment in said cause in favor of appellee herein (Mark Owen and Company) and against appellant (Michigan Central Railroad Company).

54 5. The Appellate Court for the First District erred in not affirming the judgment of the trial court.

6. The finding and judgment of the Appellate Court for the First District are contrary to the evidence.

7. The finding and judgment of the Appellate Court for the First District are contrary to the evidence.

Wherefore, for the reasons above set forth, and each of them, and for various other errors appearing in the record, Michigan Central Railroad Company, appellant herein, prays that the judgment of the Appellate Court for the First District may be vacated and set aside.

MICHIGAN CENTRAL RAILROAD COMPANY.
By WINSTON, STRAWN & SHAW,
Attorneys for Appellant.

FRANK H. TOWNER,
Of Counsel.

55 And afterwards, to wit, on the 23rd day of October, A. D. 1919, the same being one of the days of the said October term of said Supreme Court, the following proceedings were by said Court had and entered of record in the words and figures following, to wit:

No. 12978.

MARK OWEN & COMPANY, Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellant.

Appeal — First District.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and en-

tered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by F. H. Towner for appellant and W. B. Moulton for appellee, is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

56 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Second Day of December, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, within and for the State of Illinois.

Present:
Chief Justice Frank K. Dunn,
Justice James H. Cartwright,
Justice Orrin N. Carter,
Justice Clyde E. Stone,
Justice William M. Farmer,
Justice Warren W. Duncan,
Justice Floyd E. Thompson,
Edward J. Brundage, Attorney General,
Warren C. Murray, Marshal.

Attest: CHARLES W. VAIL,
Clerk.

Be it remembered, that afterward, to wit: on the 17th day of December, 1919, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to wit:

No. 12978.

MARK OWEN & COMPANY, Appellee,

v.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellant.

Error to —.

Appeal from First District.

57 No. 12978.

Agenda No. 82.

In the Supreme Court of Illinois, October Term, 1919.

MARK OWEN & COMPANY, Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellant.

Appeal from Appellate Court, First District.

Opinion by Farmer, J.

Mark Owen & Company, appellee, brought this action of the fourth class in the Municipal Court of Chicago, to recover of Appellant, Michigan Central Railroad Company, $23.30, alleged to be the value of some baskets of grapes, which were lost out of four car-load shipments, from points in Michigan over appellant's line of railroad, to appellee, at Chicago. The cause was tried in the Municipal Court of Chicago, without a jury, upon a written stipulation of facts. The Municipal Court found the issues in favor of the Defendant in that Court and the Plaintiff appealed to the Appellate Court for the First District, and that Court found the issues for plaintiff below, and rendered judgment in its favor for $23.30 and costs. The Appellate Court granted a Certificate of Importance and an appeal to this Court. It was stipulated that exhibits, designated by number, were the original bills of lading issued by appellant covering the shipments of the four cars of grapes. That the cars were transported by the appellant from points of origin to Chicago, consigned to appellee; that
58 they were placed on public delivery team tracks, notice thereof given to appellee, the seals an the cars broken and the shipments accepted by Appellee, before the loss complained of occurred. It was further stipulated that at the time Appellee started to unload the cars, each of them contained the number of baskets and pounds of grapes received by appellant for transportation.

Appellant contends that at the time the loss occurred the goods had been delivered to and accepted by appellee and the liability

as a common carrier had ceased and determined. Appellee contends that in the absence of any contract, it had a reasonable time after placement of the cars and notice, to unload them during which time appellant's liability as a carrier continued, and that at the time the loss sued for occurred, Appellant's liability by express contract was that of a common carrier. If by a fair construction of the bill of lading, which was the contract between the parties, appellant was liable as a common carrier, it will be unnecessary to determine other questions raised. In construing the bills of lading, if there be any doubt arising from the language used, as to its meaning, it is to be construed most strongly against appellant, because it was prepared by its officers or agents. Texas & Pacific Railway Co. v. Reiss, 183 U. S. 621. The grapes were an interstate shipment under a standard bill of lading, the material parts of which are: Section 1—"For loss, damage, or delay caused by fire occurring after forty-eight hours, exclusive of legal holidays, after notice of the arrival of the property at destination or at port of export, if intended for export, has been duly sent or given, the carrier's liability shall be that of warehouseman only."

59 Section 5. "Property not removed by the party entitled to receive it, within forty-eight hours, exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

As the shipments were interstate shipments, decisions of the Federal Courts construing bills of lading would control, (Gamble-Robinson Co. v. Union Pacific Railroad Co. 262 Ill. 400) if there were any such decisions, but counsel say there are none. The first section of the bill of lading as we read and understand it limits appellant's liability as a carrier to the period of forty-eight hours after notice "sent or given" of the arrival of the property at its destination. For loss occurring after forty-eight hours from the time of arrival and notice, the liability is that of warehouseman only. Section five provides that "property not removed" within forty-eight hours after notice of its arrival, may be kept in car, depot or place of delivery of the carrier subject to a reasonable charge for storage and the carrier's liability as warehouseman only, or at the option of the carrier it may be stored in a warehouse at the cost and risk of the owner without liability on the part of the carrier, subject to a lien for freight and storage charges. Appellant insists the bills of lading were designed to put a limit on its liability as a carrier in any event,

60 but that such liability ended before the expiration of that time, where as in this case the cars were placed on the public delivery team track, and appellee after being notified broke the seals, accepted the shipments and began unloading the cars. That does not appear to us to be the most reasonable construction of the language

of the bills of lading. Section five says as to property "not removed" within forty-eight hours after notice, not property "not delivered" within that time, it may be kept in car, depot or place of delivery subject to a reasonable charge for storage and the carrier's responsibility as a warehouseman only. It would seem if it had been contemplated that the liability as carrier was to cease under the facts here stipulated, which it is insisted constituted a delivery, the language of the bills of lading might easily have made that intention clear. The ordinary mind would understand, we think, from reading the bills of lading that although the car may have been placed for unloading, opened and the work of unloading begun, the carrier's liability as such continued as to "property not removed" forty-eight hours, provided that was a reasonable time for unloading, and it is not disputed that forty-eight hours was a reasonable time for appellee to unload the cars. The Municipal Court held in a proposition of law that the cars were unloaded by appellee in a reasonable time and that is not questioned by appellant. The construction we have placed on the language of the bills of lading seems to us the reasonable one. The most that can be said is that their meaning is not clear. Certainly more is left to be implied or inferred if the construction contended for by appellant is given them, than is required to construe them as we have done. The question of the construction of this form of bill of lading has been passed upon by three State courts. McEntire v. Chicago, Rock Island & Pacific Railroad Co., 98 Neb. 92; Gary Bros. & Gaffke Co. v. Chicago, Milwaukee and Puget Sound Railway Co., 49 Mont. 524; Rustad
61 v. Great Northern Railway Company, 122 Minn. 453.

The Court in the McEntire case said of Section five of the bill of lading, that the more reasonable construction was, that property, not removed within forty-eight hours after notice of its arrival, might be left in the car subject to a reasonable charge for storage and the liability of the carrier should be that of warehouseman only; that if the consignee had not opened the car and taken possession, but had left it on the side-track in the condition received, the carrier would be liable as such, forty-eight hours after notice of its arrival, and after that time as warehouseman. In that case the consignee put his own padlock on the car and kept the key in his possession.

In the Gary Bros. case a car of potatoes froze within forty-eight hours after placement and notice. The Court held the carrier liable as such under the bill of lading forty-eight hours, and that it could only be released from such liability during that time by the removal of the potatoes. The same construction was given the same form of bill of lading in the Rustad case, the Court holding that under the contract the liability as carrier continued forty-eight hours even if the law in the absence of the contract might have terminated it sooner.

We are of opinion the Judgment of the Appellate Court was correct and it is affirmed.

Judgment Affirmed.

62 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Second Day of December, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, within and for the State of Illinois.

Present:

Chief Justice Frank K. Dunn.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL,
Clerk.

Be it remembered, that, to-wit: on the 17th day of December, A. D. 1919, the same being one of the days of the said December term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

December 17th, A. D. 1919.

No. 12978.

MARK OWEN & COMPANY, Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellant.

Appeal from First District.

Error to —.

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious, or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Judgment of the Appellate Court aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by it in this behalf expended, to be taxed, and that it have execution therefor.

63 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Third Day of February, in the Year of Our Lord One Thousand Nine Hundred and Twenty, within and for the State of Illinois.

Present:

Frank K. Dunn, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL,
Clerk.

Be it remembered, that to-wit, on the 5th day of February, A. D. 1920, the same being one of the days of the said February term of said Supreme Court, the following proceedings were by said Court had and entered of record in the words and figures following, to-wit:

No. 12978.

MARK OWEN & COMPANY, Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, Appellant.

Appeal from First District.

And now on this day the Court having duly considered petition for rehearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

64 STATE OF ILLINOIS,
Supreme Court, ss:

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true copy of Transcripts of Record from the Municipal Court of the City of Chicago and the Appellate Court of the First District, in a certain cause entitled in this Court No. 12978, Mark Owen & Company vs. Michigan Central Railroad Company, a corporation, Appellant, Appeal First District, filed in this office on the 15th day of September, A. D. 1919, together with a complete transcript of proceedings had in the Supreme Court of Illinois.

Witness my hand and Seal of said Supreme Court, at Springfield, in said State, this 5th day of March, A. D. 1920.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHARLES W. VAIL,
Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Being informed that there is now pending before you a suit in which Michigan Central Railroad Company is appellant, and Mark Owen & Company is appellee, No. 12978, which suit was removed into the said Supreme Court by virtue of an appeal from the Appellate Court, First District, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,602. Supreme Court of the United States, No. 847, October Term, 1919. Michigan Central Railroad Company vs. Mark Owen & Company. Writ of Certiorari.

[Stamped:] Filed May 12, '20. Chas. W. Vail, Clerk Supreme Court.

In the Supreme Court of Illinois, October Term, A. D. 1919.

No. 12978.

MARK OWEN & COMPANY, Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a Corporation, Appellant.

Appeal from Appellate Court, First District.

Heard there on Appeal from Municipal Court of Chicago.

Hon. Leo J. Doyle, Judge, Presiding.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the certified transcript of record in the above entitled cause, now on file in the office of the Clerk of

the Supreme Court of the United States in the case entitled in that court as Michigan Central Railroad Company vs. Mark Owen & Company, No. 847 of the October Term, A. D. 1919, may be taken as the return of the Supreme Court of Illinois to the writ of certiorari granted by the Supreme Court of the United States on May 3, A. D. 1920, directed to the Supreme Court of the State of Illinois.

WILLIAM B. MOULTON,
JOSEPH A. BATES,
Attorneys for Mark Owen & Company.
WINSTON, STRAWN & SHAW,
Attorneys for Michigan Central R. R. Co.

Supreme Court of Illinois.

Clerk's Office.

Springfield, Illinois, May 12, 1920.

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the Stipulation of counsel in the case therein stated, as appears from the original now on file in this office.

Witness my signature and the seal of said Court hereto affixed, the day and year above written.

[Seal of the Supreme Court, State of Illinois, Aug. 26, 1918.]

CHAS. W. VAIL,
Clerk Supreme Court of Illinois.

[Endorsed:] File No. 27,602. Supreme Court U. S., October Term, 1919. Term No. 847. Michigan Central Railroad Company, Petitioner, vs. Mark Owen & Company. Writ of certiorari and return. Filed May 20, 1920.

APR 5 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 299

MICHIGAN CENTRAL RAILROAD COMPANY,
A CORPORATION,
Petitioner,

vs.

MARK OWEN & COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

RALPH M. SHAW,
Counsel for Petitioner.

FRANK H. TOWNER,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

MICHIGAN CENTRAL RAILROAD COMPANY,
A Corporation,
Petitioner,

vs.

MARK OWEN & COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Michigan Central Railroad Company, a corporation, defendant in a suit brought by respondent herein, submits this its petition for a writ of certiorari to review a decision of the Supreme Court of Illinois, and files herewith a certified copy of the entire transcript of the record in said cause, and also files herewith its brief in support of this petition.

STATEMENT OF THE MATTER INVOLVED AND REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT:

This cause originated in the Municipal Court of Chicago in a suit brought by respondent to recover from petitioner the sum of $23.30, alleged to be the value of

certain baskets of grapes which were lost out of four car load shipments made from points in Michigan over the line of petitioner to respondent in Chicago in October, 1914, September and November, 1915. The statement of claim filed by respondent in the Municipal Court alleged the making of the shipments and the loss of the grapes prior to delivery at destination. (Trans., 5.) No affidavit of merits was filed by petitioner to this statement, none being required under the rules of the Municipal Court of Chicago. All the facts appearing on the trial of the cause are contained in a written stipulation of the parties contained at pages 21 to 24 of the transcript. On pages 25 to 30 of the transcript appear the exhibits in the case, including the four bills of lading sued on. The facts, briefly, are that the shipments arrived in Chicago, were placed on public delivery team tracks of petitioner, notice thereof given to respondent, seals on the cars broken, the shipments accepted by respondent, and the unloading started before the losses complained of occurred. It is stipulated that at the time respondent accepted and started to unload the shipments each of said cars contained the same number of baskets and pounds of grapes as were received by petitioner in the car for transportation at the point of origin. The defense of petitioner in the trial court was that delivery of the shipments had been made prior to the time the losses occurred; that in any event its liability did not exceed that of a warehouseman, and that inasmuch as there was no affirmative proof of petitioner's negligence causing the loss, there could be no recovery. Judgment in the trial court was entered in favor of petitioner. (Trans. 13.) On appeal to the Appellate Court of Illinois for the First District the judgment of the Municipal Court of Chicago in favor of petitioner was reversed and judgment entered in that court in favor of respondent for $23.30. (Trans., 46.) Thereafter the Appellate Court

granted petitioner's petition for a certificate of importance and appeal to the Supreme Court of Illinois, in which court the judgment of the Appellate Court of Illinois was affirmed on December 17, 1919. (Trans., 62.) Petitioner's petition for rehearing in the Supreme Court of Illinois was denied by that court on February 5, 1920. (Trans., 63.)

The bills of lading covering the shipments involved were introduced in evidence as Plaintiff's Exhibits 1 to 4 inclusive. (Trans., 27-30.) Section 1 of each of these bills provided in part as follows:

> "For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carriers' liability shall be that of warehouseman only."

Section 5 of the bills provided in part as follows:

> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carriers responsibility as warehousemen only." * * *

In its opinion filed herein (Trans., 57-61), the Supreme Court of Illinois held that under these provisions of the bills of lading petitioner's liability as a common carrier of the shipments involved, extended throughout the forty-eight hour period during which the shipments were being unloaded by respondent, irrespective of the facts; that inasmuch as during this period petitioner's liability was that of a common carrier and no evidence had been produced to show how the losses occurred, petitioner was responsible.

In arriving at this conclusion the court apparently assumed that all the cars were unloaded by respondent

within 48 hours after placement and notice, whereas this is not the fact. On car 28732 respondent consumed 57 hours and 15 minutes in unloading after placement of the car and notice thereof, on car 102566, 79 hours, and on car 5586, 49 hours and 10 minutes. (Trans., 23.) In none of these cases did a Sunday or holiday intervene. There is no proof in the record as to when or how the losses occurred, so that in the case of the three cars mentioned it might well be that the losses occurred after the expiration of the 48-hour period, in which case petitioner would not be liable irrespective of the construction placed upon Sections 1 and 5 of the bills of lading.

The general reasons relied upon for the allowance of writ are:

(1) There is a federal question involved, it being the construction placed by the Illinois State Courts on Sections one and five of the interstate bills of lading covering the shipments sued upon.

(2) There is no decision by any Federal Court construing these provisions of the bill of lading. There are, however, four decisions on this point in the courts of last resort of the states of Illinois, Nebraska, Montana and Minnesota, these courts coming to different conclusions on the construction to be given the provisions in question.

(3) The question of the construction to be placed upon the provisions of the bills of lading in question is one of great importance to all common carriers of interstate freight, and should be definitely decided by this Honorable Court.

(4) The decision of the Supreme Court of Illinois does violence to the plain meaning of the provisions of the bills of lading in question, and should not be allowed to stand.

(5) In the case of three of the cars involved, the decision of the Supreme Court of Illinois imposes upon petitioner a liability as common carrier for losses which, so far as the record shows, might have occurred subsequent to the expiration of the 48-hour period mentioned in Sections 1 and 5 of the bills of lading, and during a time when petitioner, under those same provisions, was undeniably not liable as a common carrier.

WHEREFORE, petitioner prays that this, its petition for the writ of certiorari may be granted, and that this Honorable Court proceed as is provided by law and the rules of this court in such cases, and that upon final hearing the judgment of the Supreme Court of Illinois and the Appellate Court thereof be reversed.

Respectfully submitted,

Ralph M. Shaw

Counsel for Petitioner.

Frank T. Towner

Of Counsel.

FILED
APR 5 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 817 299

MICHIGAN CENTRAL RAILROAD COMPANY,
A CORPORATION,
Petitioner,

vs.

MARK OWEN & COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

RALPH M. SHAW,
Counsel for Petitioner.

FRANK H. TOWNER,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

MICHIGAN CENTRAL RAILROAD COMPANY,
A Corporation,
Petitioner,

vs.

MARK OWEN & COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Michigan Central Railroad Company, a corporation, defendant in a suit brought by respondent herein, submits this its petition for a writ of certiorari to review a decision of the Supreme Court of Illinois, and files herewith a certified copy of the entire transcript of the record in said cause, and also files herewith its brief in support of this petition.

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certain baskets of grapes which were lost out of four car load shipments made from points in Michigan over the line of petitioner to respondent in Chicago in October, 1914, September and November, 1915. The statement of claim filed by respondent in the Municipal Court alleged the making of the shipments and the loss of the grapes prior to delivery at destination. (Trans., 5.) No affidavit of merits was filed by petitioner to this statement, none being required under the rules of the Municipal Court of Chicago. All the facts appearing on the trial of the cause are contained in a written stipulation of the parties contained at pages 21 to 24 of the transcript. On pages 25 to 30 of the transcript appear the exhibits in the case, including the four bills of lading sued on. The facts, briefly, are that the shipments arrived in Chicago, were placed on public delivery team tracks of petitioner, notice thereof given to respondent, seals on the cars broken, the shipments accepted by respondent, and the unloading started before the losses complained of occurred. It is stipulated that at the time respondent accepted and started to unload the shipments each of said cars contained the same number of baskets and pounds of grapes as were received by petitioner in the car for transportation at the point of origin. The defense of petitioner in the trial court was that delivery of the shipments had been made prior to the time the losses occurred; that in any event its liability did not exceed that of a warehouseman, and that inasmuch as there was no affirmative proof of petitioner's negligence causing the loss, there could be no recovery. Judgment in the trial court was entered in favor of petitioner. (Trans., 13.) On appeal to the Appellate Court of Illinois for the First District the judgment of the Municipal Court of Chicago in favor of petitioner was reversed and judgment entered in that court in favor of respondent for $23.30. (Trans., 46.) Thereafter the Appellate Court

granted petitioner's petition for a certificate of importance and appeal to the Supreme Court of Illinois, in which court the judgment of the Appellate Court of Illinois was affirmed on December 17, 1919. (Trans., 62.) Petitioner's petition for rehearing in the Supreme Court of Illinois was denied by that court on February 5, 1920. (Trans., 63.)

The bills of lading covering the shipments involved were introduced in evidence as Plaintiff's Exhibits 1 to 4 inclusive. (Trans., 27-30.) Section 1 of each of these bills provided in part as follows:

> "For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carriers' liability shall be that of warehouseman only."

Section 5 of the bills provided in part as follows:

> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carriers responsibility as warehousemen only." * * *

In its opinion filed herein (Trans., 57-61), the Supreme Court of Illinois held that under these provisions of the bills of lading petitioner's liability as a common carrier of the shipments involved, extended throughout the forty-eight hour period during which the shipments were being unloaded by respondent, irrespective of the facts; that inasmuch as during this period petitioner's liability was that of a common carrier and no evidence had been produced to show how the losses occurred, petitioner was responsible.

In arriving at this conclusion the court apparently assumed that all the cars were unloaded by respondent

within 48 hours after placement and notice, whereas this is not the fact. On car 28732 respondent consumed 57 hours and 15 minutes in unloading after placement of the car and notice thereof, on car 102566, 79 hours, and on car 5586, 49 hours and 10 minutes. (Trans., 23.) In none of these cases did a Sunday or holiday intervene. There is no proof in the record as to when or how the losses occurred, so that in the case of the three cars mentioned it might well be that the losses occurred after the expiration of the 48-hour period, in which case petitioner would not be liable irrespective of the construction placed upon Sections 1 and 5 of the bills of lading.

The general reasons relied upon for the allowance of writ are:

(1) There is a federal question involved, it being the construction placed by the Illinois State Courts on Sections one and five of the interstate bills of lading covering the shipments sued upon.

(2) There is no decision by any Federal Court construing these provisions of the bill of lading. There are, however, four decisions on this point in the courts of last resort of the states of Illinois, Nebraska, Montana and Minnesota, these courts coming to different conclusions on the construction to be given the provisions in question.

(3) The question of the construction to be placed upon the provisions of the bills of lading in question is one of great importance to all common carriers of interstate freight, and should be definitely decided by this Honorable Court.

(4) The decision of the Supreme Court of Illinois does violence to the plain meaning of the provisions of the bills of lading in question, and should not be allowed to stand.

(5) In the case of three of the cars involved, the decision of the Supreme Court of Illinois imposes upon petitioner a liability as common carrier for losses which, so far as the record shows, might have occurred subsequent to the expiration of the 48-hour period mentioned in Sections 1 and 5 of the bills of lading, and during a time when petitioner, under those same provisions, was undeniably not liable as a common carrier.

WHEREFORE, petitioner prays that this, its petition for the writ of certiorari may be granted, and that this Honorable Court proceed as is provided by law and the rules of this court in such cases, and that upon final hearing the judgment of the Supreme Court of Illinois and the Appellate Court thereof be reversed.

Respectfully submitted,

Ralph M. Shaw

Counsel for Petitioner.

Frank H. Towner

Of Counsel.

Office Supreme Court, U. S.
FILED
MAR 26 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 299

MICHIGAN CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

MARK OWEN & COMPANY,
Respondent.

REPLY BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

RALPH M. SHAW,
Counsel for Petitioner.

FRANK H. TOWNER,
Of Counsel.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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MARK OWEN & COMPANY,
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REPLY BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

May It Please the Court:

To answer certain contentions advanced in the brief filed on behalf of respondent we wish to submit this reply.

(a) On page 6 of respondent's brief it is said:

> "If placement and notice terminated the petitioner's liability as a common carrier, as contended by the petitioner herein, then why was it necessary for it to contract with the respondent that its liability as a common carrier should not 'extend beyond a period of forty-eight hours after placement and notice?'"

The answer to the foregoing inquiry is contained on page 18 of our main brief, where it is said:

> "The clause in question is obviously for the protection of the carrier and is designed to put a limit

> on its carrier liability which might otherwise be unreasonably extended through failure on the part of the consignee to accept or take charge of property consigned to him."

This limitation is not necessary in such states as Illinois, where placement and notice does terminate the carrier liability, but, as opposing counsel have argued, there are states where the local rule allows a consignee something more, and in such states, the clause in question does establish a maximum. It should be borne in mind, in this connection, that the bills of lading issued on these shipments were in the form agreed upon by both shippers and carriers for use in all parts of the country and which was designed to meet all conditions.

(b) On page 6 of their brief, counsel for respondent also say:

> "Not only are the provisions of the bill of lading cited herein an admission that petitioner's liability as a common carrier continued for forty-eight hours after placement and notice, but by its wording petitioner expressly stipulates that it shall so continue. No other reasonable construction seems possible."

In answer to this we submit that no one can find anywhere in Section 5 of the bills of lading, a statement that during the period of 48 hours following notice of the arrival of property, petitioner's liability shall be that of a carrier as to property not removed, and this is so no matter what construction is placed on the word "removed." The clause provides that as to property not removed within 48 hours after notice of arrival at destination the liability of the carrier shall be that of warehouseman only. It does not say that as to property not removed within 48 hours after notice of arrival at destination, the carrier's liability shall be that of a carrier for the 48-hour period. It says nothing whatsoever about what the carrier's liability shall be during the 48-hour

period. It does nothing but say that after the expiration of that period its liability shall not exceed that of a warehouseman in any event. There is no ground even for inference that during the period in question the carrier's liability should arbitrarily be declared to be that of a carrier. We cannot understand how under any rule of construction, a statement that the liability after 48 hours shall not exceed that of a warehouseman can be construed to mean that during the 48 hours the liability shall be that of a carrier.

(c) On page 6 of their brief, counsel for respondent also say:

> "If the various constructions contended for by the petitioner are intended, then it failed to insert in the contract many important modifications of a very clearly expressed liability. Certainly the respondent who did not prepare the instrument should not be held to the modifications read into these provisions by the petitioner who did prepare it."

In answer to this we say we are not contending that anything should be read into Section 5 of the bills of lading and are not contending that any modification of it should be made. What we are trying to do is to prevent an unwarranted modification of it. In our judgment, the language of Section 5 is clear and unambiguous, means only what it says, and does not require modification to be easily understandable. What we object to in this case is the reading into that provision the meaning which has been read into it by the Illinois courts.

(d) On page 7 of their brief, counsel for respondent say that in the *McIntire* case, 98 Neb. 92, the decision turned on the fact that the consignee had locked the door of the car and retained the key. With this we beg to differ. In that case and on the rehearing thereof, 98 Neb. 828, the Supreme Court of Nebraska considered

Section 5 of the bill of lading without any reference to what the facts were, and by using only its common sense and ordinary logic, arrived at the construction contended for by us. In any event, it does not seem to us that the facts in any case make any difference in the construction to be given this provision of the bills of lading. The facts in each case are important as determining whether or not a delivery of the property has been made, but it is not necessary to decide this question unless it is first decided that Section 5 of the bills of lading does not arbitrarily carry the carrier liability through the 48-hour period.

(e) In discussing the *Nash* case, 43 Ind. 423, at page 13 of their brief, counsel for respondent say,

> "by the rules of petitioner in force at the time of these shipments, it was obliged to unload at the car door."

The tariff referred to provides:

> "Carload shipments of green fruit or vegetables will be received at or delivered to the car door without additional charge for loading or unloading." (Trans. 15.)

If grapes qualify as green fruit or vegetables, the most petitioner could have required to do under this tariff was move them to the doors of the cars. If it had done so on respondent's request, petitioner's carrier liability might have been extended until the service was completed, but under the facts in this case, that contingency need not be considered.

Instead of calling upon petitioner for this service, as it claims it had the right to do, respondent waived its right and undertook the unloading itself. Having done so, respondent can not now claim any extension of petitioner's carrier liability under the tariff in question. To hold otherwise would constitute respondent the agent of

petitioner for the purpose of unloading, and that without any authorization or consent by petitioner. For the purposes of this case the tariff provision referred to can have no bearing whatever.

(f) On page 14 of their brief counsel request this court to take judicial notice of the facts surrounding public team track deliveries by carriers in Chicago. There is no evidence in the record on this point, and if the facts are to be considered, this court would have to take judicial notice of them. We submit, however, that these facts are hardly a subject for the judicial notice of this court. Representing petitioner as we do in this case, we do not know the statements made by counsel for respondent on page 14 of their brief, to be true, and it is difficult for us to understand just how counsel can expect this court to be sufficiently familiar with the facts to take judicial notice of them and in any way base its decision thereon.

(g) On page 15 of their brief counsel say:

> "Before the approval of the form of the bill of lading in the present case by the Interstate Commerce Commission, the consignee had a right recognized by the courts to a reasonable time after placement and notice in which to unload, during which the liability of the carrier continued that of a common carrier."

With modifications, this was true in some jurisdictions, but not in Illinois, as would seem to be held by the Illinois cases cited by counsel. The *Schumacher* case, 207 Ill. 199, was a demurrage case; the question involved being whether or not the carrier was entitled to recover demurrage from the consignee on shipments which had arrived at destination consigned to him and of which he had not taken delivery. The point which this case is cited as sustaining, was not in issue. There are, however, many Illinois cases directly in point; all of them

holding that upon arrival of carload freight at destination, and placement upon team track, the carrier liability, as such, terminates. In *Gratiot Street Warehouse Company* v. *St. Louis, etc. R. Co.*, 221 Ill. 418, it was specifically held that when a carrier brings freight to its destination, it terminates its liability as carrier by placing it in a safe and secure warehouse, and that in the case of car load freight, the carrier liability is terminated by warehousing in the cars on the side tracks.

To the same effect are:

Illinois Central R. Co. v. *Carter*, 165 Ill. 570.
Gregg v. *Illinois Central R. Co.*, 147 Ill. 550.
McCabe v. *A. T. & S. F. R. Co.*, 154 Ill. App. 380.
Joerg v. *A. T. & S. F. R. Co.*, 152 Ill. App. 229.
St. Louis, etc. Co. v. *C. & A. R. Co.*, 151 Ill. App. 384.

Even if the Illinois cases cited by counsel for respondent held as contended, they do not represent the great weight of authority in Illinois. So far as other states are concerned, there is fully as much authority in favor of the proposition that a carrier's liability as such terminates upon the arrival of the car at destination, placing for delivery and notice to the consignee, as there is to the contrary. Among others, opposing counsel cites cases from Alabama, Missouri, North Carolina, South Carolina and New York, but the cases cited do not at all establish the rule in these states as being opposed to our position on the question of delivery. Cases from the same states cited by us in our main brief as supporting our position are:

Barclay v. *Southern R. Co.*, 1 Ala. App. 348; 6 Ala. App. 502.
Brooks Company v. *Southern R. Co.*, 152 N. C. 665.

Kingman v. *Southern R. Co.*, 133 Mo. App. 317.
Whitney v. *R. & D. R. Co.*, 36 S. C. 365.
Anthony et al. v. *N. Y. C. & H. R. R. R. Co.*, 223 N. Y. 21.

Even in states where placement and notice does not terminate the carrier liability, the carrier's obligation, as such, is extended only for the purpose of enabling the consignee to take delivery. This does not mean for the purpose of unloading or removing goods from the car. A consignee takes delivery when he takes possession. The carrier's duty is then completed, for the duty of unloading car load freight is on a consignee. Main brief, page 31; *Hutchinson* on *Carriers*, Sec. 711; *National Lumber Dealer's Association* v. *A. C. L. R. Co.*, 14 I. C. C. 154, 160. (See also Exhibit B, Trans. 15.)

It is also true that in states where the local rule allows additional time after placement and notice in which to take delivery, such additional time is allowed only when a consignee does not appear to take delivery, or when there is some additional duty on the carrier. This is unquestionably so of dead freight, such as is involved here; although in the case of live stock, the duty to provide facilities for unloading and opportunity to use them, makes the rule different. *Erie R. Co.* v. *Shuart*, 250 U. S. 465. In this case respondent not only appeared to take delivery, but accepted the shipments and commenced to unload before any loss occurred.

As deciding the question of delivery, we refer this court to its opinion in the case of *Pere Marquette Railway Company* v. *French & Co.*, No. 105, of the October Term, 1920; the opinion of this court being dated January 17, 1921. That case involved the question of a

delivery on an order bill of lading. On page 4 of the opinion, Mr. Justice Brandeis said:

> "The Supreme Court of Michigan held that the Big Four in sending the car over the Southern to Dumesnil at the request of Bindner, made not a delivery but a technical reconsignment. Whatever name be used in referring to the act of forwarding the car, the Big Four, when it surrendered possession of the car to the Southern at Bindner's request, terminated its relation as carrier; just as it would have done if, at his request, it had shunted the car onto a private industrial track, *or had given the control of it to a truckman on the team tracks.*" (*Italics ours.*)

In this case the undisputed facts are that control of all the shipments was given to respondent's truckmen on the team tracks, so that if the statement quoted is the law as declared by this court, then in this case complete delivery had been made, regardless of the holding to the contrary by state courts.

(h) On page 18 of their brief, counsel advance the proposition that 48 hours was a reasonable time for respondent to have unloaded these shipments; that the finding of the Supreme Court of Illinois to that effect is not disputed, and that the demurrage tariff of petitioner allows that period as free time in which to perform the unloading. The demurrage tariff, of course, has nothing to do with the determination of a reasonable time in which to perform the unloading. The 48 hours there referred to is allowed as free time only for the purpose of assessing charges. In any case, we contend that what is a reasonable time in which to unload is immaterial. Our contention in this case is that in Section 5 of the bills of lading there is no language which arbitrarily continued petitioner's liability as a common carrier through the first 48 hours after placement of these cars

and notice to respondent. If we are right on this point, then we maintain, under the facts and the law, complete delivery of all the shipments had been made, or that petitioner's liability, at most, did not exceed that of a warehouseman. In this there is nothing that makes the determination of a reasonable time for unloading material. If the Federal law is to control on the question of delivery, then, under the facts in this case, delivery had been made before the losses occurred. *Pere Marquette R. Co.* v. *French & Co., supra.* If the Illinois law is to control, the same conclusion results. *Gratiot St. Warehouse Co.* v. *St. Louis, etc. R. Co., supra,* and cases cited. In either event the question of what is a reasonable time for unloading is immaterial.

(i) On page 18 of their brief, counsel say:

> "The provisions of Sections 1 and 5 of the bill of lading are perfectly plain. If there were any real or supposed hardships imposed by them on the petitioner or the other railroads, adequate conditions and limitations would have been inserted in the wording of the bill of lading, or the railroads would long ago have sought to have these provisions modified as petitioner would have them construed. The respondent did all that was required of it and removed its goods within the forty-eight hour period."

In this connection we might say that the only hardships which have been imposed on petitioner under Section 5 of the bill of lading have been imposed by the rulings of the Supreme Courts of Illinois, Montana and Minnesota. No hardships would result under the wording of the bill as it now stands, if it was read as written, and without the modifications imposed by the courts named. All that we wish is to have the provisions read as written, without modification.

In answer to the statement that respondent did every-

thing it was required to do, we will say that it did do everything it was required to do, except protect its property and prevent the theft of it. Its failure in this respect, however, should not impose any liability on petitioner.

Respectfully submitted,

RALPH M. SHAW,
Counsel for Petitioner.

FRANK H. TOWNER,
Of Counsel.

FILED
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JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 229. 299

MICHIGAN CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

MARK OWEN & COMPANY,
Respondent.

BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

RALPH M. SHAW,
Counsel for Petitioner.

FRANK H. TOWNER,
Of Counsel.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

	PAGE
Argument	11
Brief of argument	6
Conclusion	34
Construction of Section 5 of bills of lading	12
Delivery of the shipments had been made	19
Liability did not exceed that of warehouseman in any event	29
Provisions of bills of lading involved	3
Specification of errors relied upon	4
Statement of the case	1
The Supreme Court of Illinois has, in effect, denied the validity of Section 5 of the bills of lading	31
Validity of bill of lading provisions	11

List of Cases Cited.

Anchor Mill Co. v. B. C. R. & N. R. Co. 102 Ia. 262	26
Anthony et al. v. N. Y. C. H. R. R. Co. 223 N. Y. 21	28
Barclay v. Southern R. Co. 6 Ala. App. 502	21
Brooks Co. v. Southern R. Co. 152 N. Car. 665	23
C. C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588	30
Chicago, etc. R. Co. v. Kelm, 121 Minn. 343	24
Denver R. G. R. Co. v. Johnson, ... Colo. ....., 193 Pac. 729	27
Erie R. Co. v. Stuart, 250 U. S. 465	31
Gary Bros. etc. Co. v. Chicago, etc. R. Co. 49 Mont. 524	15-16
G. F. & A. Ry. Co. v. Blish Milling Co. 241 U. S. 190	11
Gratiot St. Warehouse Co. v. St. Louis, etc. R. Co. 221 Ill. 418	25-33
Gregg v. I. C. R. R. Co. 147 Ill. 550	33
G. T. & W. R. Co. v. Glinski, ... Ind. App. ...., 125 N. E. 53	15
Hutchinson on Carriers	20
I. C. R. Co. v. Carter, 165 Ill. 570	33
Kansas City So. R. Co. v. Carl, 227 U. S. 639	11
Kenney Co. v. A. & W. P. R. Co. 122 Ga. 365	21
Kingman v. Southern R. Co. 133 Mo. App. 317	24
Lewis v. N. Y. O. & W. R. Co. 210 N. Y. 21	28
Levers v. A. T. & S. F. R. Co. 22 N. Mex. 599	23
McEntire v. Chicago, etc. R. Co. 98 Neb. 92 (also at 98 Neb. 828)	14-15
Michie on Carriers	20
M. K. & T. Ry. Co. v. Ward, 244 U. S. 383	12
P. C. & St. L. R. Co. v. Nash, 43 Ind. 423	25

Prescott v. Southern R. Co. 240 U. S. 632..... 30
Rothchild v. N. P. R. Co. 68 Wash. 527..... 23
Rustad v. G. N. R. Co. 122 Minn. 453.....15-16
Southern R. Co. v. Barclay, 1 Ala. App. 348..... 20
State v. Intoxicating Liquors, 106 Me. 138..... 28
St. L. I. M. & S. R. Co. v. Starbird, 243 U. S. 592..... 12
Texas, etc. R. Co. v. Robertson, ... Tex. ..... 143 S. W. 708..... 22
T. & P. Ry. Co. v. Reiss, 183 U. S. 621..... 14
United Metals Selling Co. v. Pryor, 243 Fed. 91.....29-33
Vaughn v. N. Y. etc. R. Co. 27 R. I. 235.....19-21
Whitney Co. v. R. & D. R. Co. 38 S. Car. 365..... 25

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MICHIGAN CENTRAL RAILROAD COMPANY,
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vs.

MARK OWEN & COMPANY,
Respondent.

BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This action was brought in the Municipal Court of Chicago by Mark Owen & Company, respondent here, to recover from petitioner, Michigan Central Railroad Company, $23.30 alleged to be the value of certain baskets of grapes which were lost out of four carload shipments from points in Michigan over the line of petitioner to respondent in Chicago in October, 1914, September and November, 1915. The statement of claim filed by respondent in the Municipal Court alleged the making of the shipments and the loss of the grapes prior to delivery at destination. (Trans., 3.) No affidavit of merits or answer to this statement of claim was filed by peti-

tioner, none being required under the rules of the Municipal Court of Chicago. The case was tried on a written stipulation of the facts. (Trans., 11-15.) These facts, briefly, are that the shipments sued on arrived in Chicago, their proper destination, were placed on public delivery team tracks by petitioner, no other place of delivery being specified, notice thereof given to respondent, the seals on the cars broken, the shipments accepted by respondent, and the unloading started by it. (Trans., 12.) Up to this time there had been no loss. (Trans., 13.) On car 28732 respondent consumed 57 hours and 15 minutes in unloading, after placement of the car and notice thereof; on car 22049, 9 hours; on car 102566, 79 hours and on car 5586, 49 hours and 10 minutes. (Trans., 12.) During these periods consumed by respondent in unloading the shipments the losses complained of occurred. (Trans., 13.) There was no evidence or proof as to how the losses occurred or the cause thereof. The defense of petitioner in the trial court was that delivery of all the shipments had been made prior to the time the losses occurred; that if this were not so, its liability in any event did not exceed that of a warehouseman, and respondent could not recover in the absence of affirmative proof of petitioner's negligence causing the loss. Judgment in the trial court was in favor of petitioner. (Trans., 7.) On appeal to the Appellate Court of Illinois for the First District, this judgment in favor of petitioner was reversed and judgment entered in that court in favor of respondent for $23.30. (Trans., 23.) Thereafter the Appellate Court of Illinois for the First District granted petitioner's petition for a certificate of importance and appeal to the Supreme Court of Illinois, in which court the judgment of the Appellate Court was affirmed (291 Ill. 149) on December 17, 1919. (Trans., 32-33.) Petitioner's petition for rehearing in the Su-

preme Court of Illinois was denied on February 5, 1920. (Trans., 33.) Thereafter a petition for a writ of certiorari directed to the Supreme Court of Illinois was filed in this court on April 5, 1920. This petition was granted, the writ and return being filed on May 20, 1920. (Trans., 36.)

The bills of lading covering the shipments involved herein were introduced in evidence as Plaintiff's Exhibits 1 to 4, inclusive. (Trans., 14-15.) Section 1 of each of these bills of lading provides in part as follows:

> "For loss, damage or delay caused by fire occurring after 48 hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only."

Section 5 of each of the bills of lading provides in part as follows:

> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier or warehouse subject to a reasonable charge for storage, and to carrier's responsibility as warehouseman only."

In its opinion filed herein (Trans., 29, 31), the Supreme Court of Illinois held that under the provisions of the bills of lading which we have cited, petitioner's liability as a common carrier of the shipments involved, extended throughout the 48-hour period during which they were being unloaded by respondent, without reference to the facts; that inasmuch as during this period petitioner's liability was that of a common carrier and no evidence had been produced to show how the losses occurred petitioner was responsible, it apparently being assumed by the court that all the shipments were unloaded within 48 hours, although this is not the fact.

SPECIFICATION OF ERRORS RELIED UPON.

I.

The Supreme Court of Illinois erred in holding and adjudging that under Section 1 and Section 5 of the bills of lading covering the shipments sued on, the liability of petitioner as a common carrier of said shipments extended throughout the period of 48 hours following placement of the cars and notice thereof to respondent.

II.

The Supreme Courtof Illinois erred in holding and adjudging that petitioner's liability during the time consumed by respondent in unloading the shipments sued on in this case was that of a common carrier.

III.

The Supreme Court of Illinois erred in holding and adjudging, in substance, that Section 5 of the bills of lading covering the slipments sued on in this case was invalid in so far as it provided that after the expiration of 48 hours after placement of the cars and notice thereof to respondent the liability of petitioner would be that of a warehouseman only.

IV.

The Supreme Court of Illinois erred in holding and adjudging that delivery of the four shipments sued on herein had not been made by petitioner prior to the losses complained of.

V.

The Supreme Court of Illinois erred in holding and adjudging that petitioner's liability with respect to the four shipments involved exceeded that of a warehouseman during the period consumed by respondent in unloading said shipments.

BRIEF OF ARGUMENT.

I.

THE PROVISIONS OF THE BILLS OF LADING COVERING THE SHIPMENTS SUED ON ARE BINDING ON THE PARTIES HERETO AND THE LIABILITY OF PETITIONER IS TO BE MEASURED BY THOSE PROVISIONS SO FAR AS THEY ARE VALID UNDER THE ACT TO REGULATE COMMERCE.

All of the shipments sued on in this case moved in interstate commerce over the line of petitioner. Since the effective date of the Carmack Amendment to the 20th section of the Act to Regulate Commerce (34 Stat. at L. 593), the decisions of this court have been uniform to the effect that in so far as the provisions of a bill of lading required to be issued by the amendment are valid, they determine the rights of the parties.

Kansas City Southern R. Co. v. *Carl*, 227 U. S. 639.

G. F. & A. Ry. Co. v. *Blish Milling Co.*, 241 U. S. 190.

St. L. I. M. & S. R. Co. v. *Starbird*, 243 U. S. 592.

M. K. & T. Ry. Co. v. *Ward*, 244 U. S. 383.

There was one amendment to the Carmack Amendment to the 20th section of the Act to Regulate Commerce, prior to some of these shipments (38 Stat. at L. 1196), but this amendment did not affect the obligation of the carrier to issue a bill of lading nor the binding effect of the provisions of such bill of lading when issued, in so far as its provisions were valid. No argument has been made in this case that the provisions of the bills of lading involved were not valid and binding on the parties; in fact, respondent has consistently

argued that they are valid and the Appellate and Supreme Courts of Illinois have so held. The dispute is as to the construction to be placed on certain of them.

II.

UNDER SECTION ONE AND SECTION FIVE OF THE BILLS OF LADING COVERING THE SHIPMENTS SUED ON IN THIS CASE, THE LIABILITY OF PETITIONER AS A CARRIER WAS NOT EXTENDED THROUGHOUT THE PERIOD OF FORTY-EIGHT HOURS FOLLOWING PLACEMENT OF THE CARS AND NOTICE THEREOF TO RESPONDENT AND CONSUMED BY RESPONDENT IN UNLOADING THE SHIPMENTS.

The Supreme Court of Illinois, without considering any other question, held that under Sections one and five of the bills of lading, petitioner's liability during the first forty-eight hours following the placement of the cars and notice thereof to respondent was that of a carrier as to property which had not been taken out of the cars by respondent. This construction of the language of the provisions in question is without foundation and does violence to the language itself. Section 1 is not material, as it deals with loss resulting from fire. Section 5 is for the protection of the carrier, but this protection is withdrawn under that construction, as it will impose upon a carrier in many cases, a liability which it would not be subject to in the absence of such a provision with that meaning attached. This section has been construed in four state courts other than the Supreme Court of Illinois. Cases supporting our theory are:

McEntire v. *Chicago, etc. Ry. Co.* 98 Neb. 92; 152 N. W. 305; on rehearing, 98 Neb. 828; 154 N. W. 722.

G. T. & W. R. Co. v. *Glinski,* ..... Ind. App. .....; 125 N. E. 53.

The cases holding the opposite view are:

Gary Bros. etc. Co. v. *Chicago, etc. R. Co.* 49 Mont. 524; 143 Pac. 955.

Rustad v. *G. N. R. Co.* 122 Minn. 453; 142 N. W. 727.

III.

THERE BEING NOTHING IN THE APPLICABLE PARTS OF SECTIONS ONE AND FIVE OF THE BILLS OF LADING SUED ON EXTENDING PETITIONER'S LIABILITY AS A COMMON CARRIER THROUGH THE FIRST FORTY-EIGHT HOURS AFTER PLACEMENT OF THE CARS AND NOTICE TO RESPONDENT, DELIVERY OF THE SHIPMENTS SUED ON HAD BEEN MADE; OR, IF NOT, PETITIONER'S LIABILITY AT THE TIME THE LOSSES SUED FOR OCCURRED, DID NOT EXCEED THAT OF A WAREHOUSEMAN.

Petitioner contends that delivery of these shipments had been made prior to the losses sued for, there being nothing in the provisions of the bills of lading extending its liability as a carrier through the first forty-eight hours following placement of the cars and notice thereof to respondent. Whether this delivery had been made is ordinarily a question of fact but in this case, the facts being stipulated, it becomes a question of law.

In this case the contract of carriage had been completed. Petitioner had done with these shipments all that it contracted to do. They had been accepted by respondent, the seals broken and unloading started, at which time there was no loss. Under substantially similar circumstances, state courts have been uniform in their holdings that a delivery has been made and there is no liability with the carrier either as a carrier or as a warehouseman.

Hutchinson on Carriers (3rd Ed.), Vol. 2, Sec. 711.

Michie on Carriers, Vol. 1, Sec. 843.

Southern R. Co. v. *Barclay,* 1 Ala. App. 348; 56 So. 26.

Barclay v. *Southern R. Co.* 6 Ala. App. 502; 60 So. 479.

Kenny Co. v. *A. & W. P. R. Co.* 122 Ga. 365; 50 S. E. 132.

Vaughn v. *N. Y. etc. R. Co.* 27 R. I. 235; 61 Atl. 695.

Texas, etc. R. Co. v. *Robertson,* ..... Tex. .....; 143 S. W. 708.

Rothchild v. *N. P. R. Co.* 68 Wash. 527; 123 Pac. 1011.

Brooks Co. v. *So. R. Co.* 152 N. Car. 665; 68 S. E. 243.

Levers v. *A. T. & S. F. R. Co.* 22 N. Mex. 599; 166 Pac. 1178.

Chicago, etc. R. Co. v. *Kelm,* 121 Minn. 343; 141 N. W. 295.

Kingman v. *Southern R. Co.* 133 Mo. App. 317; 112 S. W. 721.

Gratiot Street Warehouse Co. v. *St. Louis, etc. R. Co.* 221 Ill. 418; 77 N. E. 675.

P. C. & St. L. R. Co. v. *Nash,* 43 Ind. 423.

Whitney Co. v. *R. & D. R. Co.* 38 S. Car. 365; 17 S. E. 147.

Anchor Mill Co. v. *B. C. R. & N. R. Co.* 102 Ia. 262; 71 N. W. 255.

Denver & R. G. R. Co. v. *Johnson,* ..... Colo. .....; 193 Pac. 729.

State v. *Intoxicating Liquors,* 106 Me. 138; 76 Atl. 265.

Lewis v. *N. Y. O. & W. R. Co.* 210 N. Y. 21; 104 N. E. 944.

Anthony et al. v. *N. Y. C. & H. R. R. Co.* 223 N. Y. 21; 119 N. E. 90.

If, however, under the facts of the case, complete delivery of the shipments had not been made, petitioner's liability at most did not exceed that of a warehouseman. Under this theory of the case the burden was on respondent to prove the negligence of petitioner causing the losses before there could be a recovery and this proof not being made, there could be no judgment in favor of respondent.

United Metals Selling Co. v. *Pryor et al.* 243 Fed. 91.

Prescott v. *Southern R. Co.* 240 U. S. 632.

IV.

EVEN UNDER THE CONSTRUCTION PLACED BY THE SUPREME COURT OF ILLINOIS ON SECTION FIVE OF THE BILLS OF LADING SUED ON HEREIN, THE JUDGMENT OF THAT COURT IS ERRONEOUS AS TO THREE OF THE SHIPMENTS INVOLVED.

Under the stipulated facts respondent consumed more than forty-eight hours after placement of the shipments and notice to it, in unloading three of the shipments sued on. The losses sued for occurred sometime between the time the unloading started and the time it was completed, there being no proof as to whether the losses occurred prior to the expiration of the forty-eight-hour period or subsequent thereto. It was incumbent on respondent to make its proof in order to recover. The effect of the judgment of the Supreme Court, under these circumstances, is to deny the validity of that part of Section 5 of the bills of lading which provides that after the expiration of forty-eight hours after arrival of the cars and notice thereof to respondent, petitioner's liability shall be that of a warehouseman only.

ARGUMENT.

I.

THE PROVISIONS OF THE BILLS OF LADING COVERING THE SHIPMENTS SUED ON ARE BINDING ON THE PARTIES HERETO, AND THE LIABILITY OF PETITIONER IS TO BE MEASURED BY THOSE PROVISIONS SO FAR AS THEY ARE VALID UNDER THE ACT TO REGULATE COMMERCE.

The Carmack Amendment to the 20th section of the Act to Regulate Commerce (34 Stat. at L. 593) required that every carrier receiving property for interstate transportation should issue bills of lading therefor and should be liable to the lawful holder thereof for loss or damage to the shipment covered hereby. In dealing with this amendment to the act, this court has repeatedly held that the provisions of the bills of lading required to be issued are binding on the parties thereto. In *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, this court said, at page 648:

> "As the shipment was interstate, the contract was controlled by the 20th section of the Act of Congress of June 29, 1906. * * * The liability of any carrier in the route over which the articles were routed for loss or damage is that imposed by the Act as measured by the original contract of shipment so far as it is valid under the Act."

In the case of *G. F. & A. Ry. Co.* v. *Blish Milling Co.* 241 U. S. 190, this court said, at page 194:

> "The connecting carrier is not relieved from liability by the Carmack Amendment but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid."

The same holdings were made by this court in *St. L. I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, at page 597, and *M. K. & T. Ry. Co.* v. *Ward*, 244 U. S. 383, at page 387.

In June, 1915, the first Cummins Amendment to the Carmack Amendment to the Act to Regulate Commerce (38 Stat. at L. 1196) became effective, but this amendment did not in any way affect the obligation of the initial carrier to issue a bill of lading nor did it in any way relieve the parties to such a bill from being bound by its provisions, except in so far as such a bill of lading attempted to relieve a carrier from full liability for loss and damage in transit by means of limitations of liability based upon reduced rates. For the purposes of this case, the first Cummins Amendment referred to did not in any way alter the law as declared by this court in the cases we have cited. No question is raised as to the validity and binding effect of the provisions of the bills of lading in this case; in fact, the judgment of the Supreme Court of Illinois is based upon an implied holding that they are valid and binding on the parties.

II.

UNDER SECTION ONE AND SECTION FIVE OF THE BILLS OF LADING COVERING THE SHIPMENTS SUED ON IN THIS CASE, THE LIABILITY OF PETITIONER AS A CARRIER WAS NOT EXTENDED THROUGHOUT THE PERIOD OF FORTY-EIGHT HOURS FOLLOWING PLACEMENT OF THE CARS AND NOTICE THEREOF TO RESPONDENT AND CONSUMED BY RESPONDENT IN UNLOADING THE SHIPMENTS.

The decision of the Supreme Court of Illinois in this case is based entirely on the construction placed by it on Sections 1 and 5 of the bills of lading covering the ship-

ments sued on. Section 1 of each bill of lading provides in part as follows:

> "For loss, damage or delay caused by fire occurring after 48 hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export), has been duly sent or given, the carrier's liability shall be that of warehouseman only."

Section 5 of each of the bills of lading provides, in part, as follows:

> "Property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The Supreme Court of Illinois held that under that part of Section 5 as quoted, the liability of petitioner as a carrier extended throughout the 48-hour period following placement of the cars and notice thereof to respondent, as to property not removed and that inasmuch as a portion of each shipment was lost sometime between the time the unloading started and the time it was finished, petitioner was liable. The part of Section 1 of the bill of lading which we have referred to, and which was cited by the Supreme Court of Illinois, is not material in this case as it deals only with loss resulting from fire. We contend that the construction placed by the Supreme Court of Illinois upon the applicable part of Section 5 of the bills does violence to the language used and imposes upon petitioner under the cir-

cumstances of this case, a liability which is without foundation, either in the law or in the language of the bills of lading.

To begin with, we contend the Supreme Court of Illinois fell into error in applying the rule of construction approved in *T. & P. Ry. Co.* v. *Reiss,* 183 U. S. 621. That case was decided on January 13, 1901, and involved the construction to be given a bill of lading issued by the initial carrier of the shipment sued on. The bills of lading involved in this case are in the form approved by the Interstate Commerce Commission in *"In the Matter of Bills of Lading,"* 14 I. C. C. Rep. 346, decided June 27, 1908, in which case the Commission said:

> "The bill as submitted represents in most, if not all, of its principal features, a virtual agreement between shippers and carriers."

We submit that in arriving at the correct construction of the clause in question, respondent should not be handicapped because the bills of lading were issued by it. So far as we have been able to find, there are four decisions on this language of the bill of lading in various state courts, aside from the decision of the Supreme Court of Illinois in this case.

In *McEntire* v. *Chicago, etc. Ry. Co.* 98 Nebraska, 92, 152 N. W. 305, the facts were that the carload of furniture involved was destroyed by fire on the defendant's sidetrack where it had been placed by defendant, after notification to the plaintiff and after a portion of the goods had been unloaded by plaintiff. The only distinction between the facts in that case and the facts in this case is that in that case, the plaintiff, after unloading a portion of the furniture placed his own lock on the car. In construing Section 5 of the bill of lading which was identical with the same section in the bills of lading involved in this case, that court said:

"Plaintiff insists that under the shipping con-

tract set out, an absolute liability rests on the carrier for 48 hours after notice of the arrival of the car or until the consignee has taken actual physical possession of the property by removing it from the car and that after the 48-hour period, the liability of warehouseman exists. But we do not believe the contract susceptible of this construction. A more reasonable construction seems to be that property not removed by the consignee within 48 hours after notice of its arrival may be left in the car subject to a reasonable charge for storage and that the liability of the carrier shall be that of warehouseman only. * * *

The property was so bulky that it did not reasonably admit of an actual physical transfer but the carrier, by giving permission to unload, surrendered its control and dominion. There was nothing further for it to do and the consignee, by breaking the seal and locking the door with its own lock and retaining the key, assumed control and dominion and the transfer and delivery was complete."

The rehearing of the same case is reported at 98 Neb. 828, 154 N. W. 722, the court adhering to its original decision, after a consideration of the cases of *Gary Bros. etc. Co.* v. *Chicago, etc. R. Co.* 48 Mont. 524, 143 Pac. 955, and *Rustad* v. *G. N. R. Co.* 122 Minn. 453, 142 N. W. 727, cited by the Supreme Court of Illinois in support of its conclusion.

In *G. T. & W. R. Co.* v. *Glinski,* ..... Ind. App. ....., 125 N. E. 53, the shipment arrived at destination, the consignee was notified and unloaded a portion of the goods, thereafter closing the door of the car and informing the carrier's agent that he was leaving the property in his care. Two days later when the plaintiff went to unload the balance of his property he found part of it missing. Section 5 of the contract of shipment in that case was in the same words as Section 5 of the contract in the case at bar. In passing on that case the court said:

"If the goods were delivered to appellee, appel-

> lant's liability was at an end. If there was no delivery of the goods left in the car, then appellant's liability had not ended. Instruction No. 8 informed the jury that as a matter of law appellant was in duty bound to care for and guard such goods for a pèriod of 48 hours after their arrival without any reference to whether the goods had been delivered or not. This instruction would have been correct if it had been limited to the theory that there had not been a delivery of the goods, but in the form given, it was error for which judgment must be reversed."

In the Gary and Rustad cases, *supra,* the courts held the contrary with respect to the provision in question. In the Gary case the potatoes involved were frozen within 48 hours after placement of the car and notice to the consignee, but after the consignee had inspected them, accepted and taken charge of them. The court held that there being no removal of the property from the car before it was damaged and the carrier, having undertaken to answer for its safety as a carrier for 48 hours or until it was removed, was liable. In the Rustad case substantially the same conclusion was reached in so far as the construction of the bill of lading was concerned, although in that case the loss sued for occurred after the 48-hour period had expired, and it was not necessary for the court to pass upon the clause in question in order to decide the case.

We submit that the construction placed upon the provision of the bills of lading involved in the McEntire and Glinski cases, *supra,* is correct. The judgment of the Supreme Court of Illinois is founded primarily upon the fact that some of the property was in the cars at the time the losses complained of occurred, the theory apparently being that there must have been an actual physical taking of the property by the consignee before petitioner's liability as a carrier terminated. The court did not consider the possibility of there being a con-

structive removal of the property in so far as the liability of petitioner was concerned, separate from the actual physical taking thereof by respondent. Yet we submit that there could be such a removal and that there was such a removal in this case.

Under the construction approved by the Supreme Court of Illinois a carrier would be liable as such for loss or damage to a carload shipment on a private track of a consignee on his property and under his exclusive control, if the property had not been taken out of the car and the damage occurred before the expiration of 48 hours after the setting of the car on the track and notice to the consignee; for in such a case there would have been no physical removal of the property. Yet in such a case, the holding of a carrier to its carrier liability or indeed, to any liability, would be ridiculous. Under the same construction, we presume a carrier would be liable as such for damage to property actually taken out of a car by the consignee's agents, on the carrier's public delivery track, on the theory that the shipment had not been physically removed off the carrier's land. Such a proposition would be equally ridiculous, and yet we submit, that if it is not correct, the judgment in the case at bar is wrong. In each of the instances we have cited there would be a liability under the construction placed upon the word "removed" by the Supreme Court of Illinois; in the first case because there had been no removal from the car, which is the carrier's property, and in the second case, because there had been no removal off the carrier's land. Under the same theory, we suppose petitioner would be liable as carrier in this case if the losses had occurred after the grapes were on respondent's wagons but still on petitioner's land. The effect of this construction is to make respondent's agents the agents of petitioner; and that without any choice

on the part of petitioner. We submit that property is removed under Section 5 of the bills of lading when a carrier has discharged its duty with reference thereto and the consignee thereof has assumed control and dominion over it.

We ask the court to consider the effect of the holding made by the Supreme Court of Illinois under the circumstances of the case at bar. The cars involved had been placed on petitioner's public delivery team track, there being no other place of delivery specified in the contract; respondent had been notified of such placement, had broken the seals on the cars, and accepted the shipments and had commenced the unloading before the losses complained of occurred. Petitioner had complied with its contract of shipment and had done all that it was obligated to do; it had given up all dominion over the property and this dominion had been assumed by respondent. It is true that all the property had not been physically removed from the car before the losses complained of occurred but there was in effect a removal of the property so far as the liability of petitioner was concerned, for there was nothing left for it to do. Notwithstanding the fact that all of the property in these cars was not removed at the same time, it is still nevertheless true that under the stipulated facts it was under the sole jurisdiction and control of respondent; and even respondent has been unable to suggest any additional duty on petitioner under the circumstances of this case. The clause in question is obviously for the protection of the carrier and is designed to put a limit on its carrier liability which might otherwise be unreasonably extended through failure on the part of the consignee to accept or take charge of property consigned to him. The effect of the decision of the Supreme Court of Illinois is to impose a carrier lia-

bility upon petitioner through the 48-hour period, merely by reason of the accident of respondent being unable to complete the unloading without leaving a portion of the property in the car and on petitioner's land for a space of time. This, we submit, is manifestly incorrect in law and unjust on principle. As the Supreme Court of Rhode Island said in *Vaughn* v. *N. Y. etc. R. Co.* 27 R. I. 235, 61 Atl. 695:

> "The fact that it (the shipment) remained in the defendants' cars was a mere matter of convenience for the plaintiff but did not impose any liability on the defendant."

III.

THERE BEING NOTHING IN THE APPLICABLE PARTS OF SECTIONS ONE AND FIVE OF THE BILLS OF LADING SUED ON EXTENDING PETITIONER'S LIABILITY AS A COMMON CARRIER THROUGH THE FIRST FORTY-EIGHT HOURS AFTER PLACEMENT OF THE CARS AND NOTICE TO RESPONDENT, DELIVERY OF THE SHIPMENTS SUED ON HAD BEEN MADE; OR, IF NOT, PETITIONER'S LIABILITY AT THE TIME THE LOSSES SUED FOR OCCURRED, DID NOT EXCEED THAT OF A WAREHOUSEMAN.

On this point we submit that under the facts of this case delivery of all these shipments had been completed before the losses sued for occurred. As we have heretofore argued, petitioner's contract had been completed and there was nothing left for it to do. Respondent had assumed complete dominion over the property shipped, having accepted it. This, we submit, constituted a complete delivery of the shipments, terminating petitioner's liability. Under substantially similar facts the textbooks and the courts of the various states are practically a unit in holding delivery has been completed.

In Hutchinson on Carriers (3rd Edition), Volume 2, Section 711, it is said:

> "All, therefore, that can be required of the railroad company is that it shall place the cars where they may be safely and conveniently unloaded; or place them at the designated place, if a certain place has been named in the contract of shipment, and if notice is required by some rule of law a binding usage, or the contract, notify the party entitled to the freight of its action."

In Michie on Carriers, Volume 1, Section 843, it is said:

> "But the carrier's liability is terminated where the consignee has actually accepted the goods, as where they are pointed out to him and he removes a portion, or has paid the freight or the carrier retains the goods at his request."

In *Southern R. Co.* v. *Barclay*, 1 Ala. App. 348, 56 So. 26, delivery of the car containing the property in question had been made on carrier's sidetrack. In the afternoon of that day the plaintiff partially unloaded the car. That evening the property remaining in the car was damaged by rain. The only difference in the facts in this case and in the case at bar is that in the Barclay case the consignee placed a lock on the car after partially unloading it. The court says:

> "The consignee cannot take charge of the goods as completely delivered and continue to hold the carrier to a liability, either as a carrier or as a warehouseman. This is what the consignee in the case at bar is undertaking to do. When the car containing his goods was left on the siding at the point of destination, he assumed complete control of it and of its contents. * * * What he did amounted to an acceptance by him of the leaving of the car on the siding as a complete delivery. The consignee was entitled to but one delivery by the carrier. By assuming control of his goods he released the railway company from any further responsibility whether as a carrier or as a warehouseman."

In *Barclay* v. *Southern R. Co.* 6 Ala. App. 502, 60 So. 479, which was a second appeal of the same case, the court said:

> "The defendant cannot be held liable to respond in damages under its contract of shipment, either as a warehouseman or as a common carrier, for injuries or damage received to the goods from whatever cause resulting after completion by the defendant of its contract by carrying the goods to the point of destination and there delivering them to a consignee who accepts the shipment and assumes sole custody of the goods before the damage is suffered."

In *Kenny Company* v. *A. & W. P. R. Co.* 122 Ga. 365, 50 S. E. 132, the car in question had been placed by the carrier on its delivery track and the consignee notified. On the next day the consignee unloaded a portion of the shipment, and after doing so, the carrier sealed the car up. On the following morning it developed that there had been a loss during the previous night. Under these facts the court held that there had been a delivery prior to the loss, saying:

> "The railroad company was bound to safely deliver this sugar to the consignee and this it did. The agent of the consignee, after verifying the number of barrels and bags in the car, signed a receipt in full which he delivered to the railroad company. This, in our opinion, constituted a complete delivery of the goods by the railroad to the consignee, Kenny Company. The goods were in a car at a place where the consignee could get them and while it is true that it did not remove all of the sugar on the same day, the record fails to disclose that the defendant company did anything to prevent its delivery."

In *Vaughn* v. *N. Y. etc. R. Co.* 27 R. I. 235, 61 Atl. 695, the cars containing the property in question had been placed on the defendant's spur track at destination and the plaintiff notified. The cars were then opened by plaintiff and part of the contents removed by him. That

night the plaintiff put his locks on the cars and early the following morning they were destroyed by fire. The court said:

> "The testimony is not clear as to how much of the bran and gluten was removed but we think it sufficiently appears that a sufficient delivery of these two carloads was made to the plaintiff and that he exercised and retained dominion as owner over the contents so that he could not thereafter claim that he had not received them and that they were not his property. * * * The property had been delivered on the spur track of the plaintiff, he had accepted it, sold and removed some of it, and had assumed full dominion over it; and the mere fact that it remained in the defendant's cars was a mere matter of convenience for the plaintiff, but did not impose any liability on the defendant."

In *Texas, etc. R. Co.* v. *Robertson,* ..... Tex. ....., 143 S. W. 708, the car containing the property had arrived at destination, had been set in the usual and customary place for unloading and the consignee had taken some of the goods out of the car and thereafter sealed it up on his own account. Thereafter it was destroyed by fire of unknown origin. In deciding the case, the court said:

> "The railroad company transported the car of merchandise from Dallas to Grand Saline and placed the same on the unloading track for the plaintiff. Plaintiff surrendered the bill of lading to the carrier and received and hauled away some of the merchandise. At the special request of the shipper, some of the merchandise was permitted to remain in the car, for which privilege he agreed to pay demurrage. The railroad having fully performed its duty of transporting the merchandise could not be held liable as carrier. There was no negligence shown on the part of the railroad company in permitting the merchandise to remain in the car while it was standing on the track, without which the company could not be held liable as warehouseman. The evidence showing that the contract of carriage had been fully per-

formed, the court should have entered judgment for defendant."

In *Rothchild* v. *N. P. R. Co.* 68 Wash. 527, 123 Pac. 1011, the car containing the property had reached destination, had been spotted on the team track for delivery, the bill of lading surrendered and the consignee notified. On the following day the consignee's teamster went to the car to unload it at which time it burst into flame and the property was entirely consumed. The court held that there had been a delivery of the property, saying:

> "Not only had the bill of lading been surrendered and the car been spotted on the defendant's delivery tracks for delivery before the fire occurred, but the plaintiff's agents had actually reached the car with teams, had broken the seal of the car and had opened and entered it for the purpose of removing the property. This clearly constitutes a delivery. There was not only a surrender of the right of possession of the property by the defendant, but there was an actual surrender of the property itself by the defendant and an actual taking of the property by the plaintiff. Delivery could have been no more complete had the wagons been actually loaded and started on their way to the plaintiff's warehouse."

In *Brooks Co.* v. *Southern R. Co.* 152 N. C. 665, 68 S. E. 243, the action was to recover for delay in shipment, the question being when the property had been delivered. The court said:

> "Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches destination and is placed for unloading."

In *Levers* v. *A. T. & S. F. Ry. Co.* 22 N. M. 599, 166 Pac. 1178, the court said:

> "A delivery of property transported by a common carrier to the consignee is not made and does not become effectual until the consignee is placed either in actual or constructive possession of the property. Property transported in carload lots may

be delivered by the placing of the car in which such property is loaded upon a siding or other convenient place for unloading, at its destination, and the surrender by the railroad company of its dominion over the same, to the consignee."

In *Chicago, etc. R. Co.* v. *Kelm*, 121 Minn. 343, 141 N. W. 295, the cars containing the property had been placed for delivery on the consignee's orders and the unloading was started on the following day. On the afternoon of the same day one of the cars caught fire and was damaged. The court held that there had been a delivery, saying:

"Where a carrier transports bulky freight, in carload lots, to its destination, and, to enable the consignee to unload it conveniently, places the cars upon a track designated by the consignee for that purpose, or, if he has made no such designation, upon a track proper for that purpose, and he has notice thereof, it is held by several courts that the carrier has performed the last act required by its duty to the consignee, that the delivery is complete, and that the carrier's liability as carrier has terminated. * * * As defendant's four carloads of hay had been placed at the point designated by him, for his convenience in unloading them, and the possession of the hay had been turned over to and taken by him for the purpose of removing it, and he had actually begun such removal, so that the final act required of the plaintiff in the performance of its duty had been completed before the fire, plaintiff's absolute liability as carrier had terminated, and it was liable for the subsequent damage to the property only in case such damage resulted from its negligence."

In *Kingman* v. *Southern R. Co.* 133 Mo. App. 317, 112 S. W. 721, the cars containing the property had been placed on a switch track where they were subsequently damaged by floods. The court said:

"Plaintiff's evidence tends to show that it had the right to inspect the cars after they were placed on the switch before accepting them. This right

> does not militate against defendant's contention that a delivery on the switch was a sufficient delivery to release it from liability as a common carrier as to said cars, for a delivery subject to the right of inspection placed them under the dominion of plaintiff, and defendant had no right to interfere with that dominion, unless on inspection, plaintiff rejected the cars and notified defendant of its rejection. * * * The evidence shows that the goods were in the possession of the plaintiff; hence plaintiff failed to make out its case and the demurrer to the evidence was properly sustained."

In *Gratiot St. Warehouse Company* v. *St. Louis, etc. R. Co.* 221 Ill. 418, 77 N. E. 675, the court said:

> "When the carrier has brought the goods or the freight to their destination, it has a right to place them in a safe and secure warehouse, and its liability then changes from that of a common carrier to that of a warehouseman. * * * When the carrier has no depot or warehouse at the place of destination for the storage of such freight as corn, it may be warehoused in the cars on the sidetracks."

In *P. C. & St. L. R. Co.* v. *Nash,* 43 Ind. 423, the car containing the property had arrived at destination, but had not been placed on the usual track for delivery. The following night it was burned, the cause of the fire being unknown. The court therefore held that the contract of carriage had not been completed but said:

> "Where the articles shipped are such as cannot be safely deposited in a warehouse, and where the carrier is not required by contract or usage to unload the car, the delivery will be regarded as complete when the car is placed at the usual place of delivery or at some safe and convenient place designated by the consignee, and such consignee has received notice of such arrival and delivery. In such case the car so placed would be the equivalent of the warehouse and the liability of a warehouseman would attach."

In *Whitney Company* v. *R. & D. R. Co.* 38 S. C. 365,

17 S. E. 147, the car containing the property had been placed for delivery and was in the course of being unloaded by the consignee at the time it was destroyed by fire. In holding that delivery had been made, the court said, referring to the carrier:

> "It had transported the goods from the point of shipment to the place of delivery in perfect condition. The waybill had been delivered up as a receipt to the railroad company therefor. Not only were the goods receipted for but actually received. * * * There was absolutely no testimony that the defendant had in any manner interfered with this property after such delivery; and in the absence of all testimony to this effect, there was no issuable fact for the jury to try."

In *Anchor Mill Company* v. *B. C. R. & N. R. Co.* 102 Ia. 262, 71 N. W. 255, the cars containing the property had arrived at destination and had been placed on a delivery sidetrack. On the next morning the plaintiff was notified. On the following day the consignee took part of the property out of the car. In holding that there had been a delivery, the court said:

> "The railroad company, in order to deliver this wheat in bulk, certainly could not be expected to unload it. All that could be required was that it place the car where it could be safely and conveniently unloaded by the party entitled to it, and notify him of its action. When it had done this, its duties as a common carrier ended. In this case the car was put at the very place plaintiff had requested, for the purpose of being unloaded, and the plaintiff duly notified of its action. What more could the railway company do to complete the delivery? It had delivered the car, in so far as it was capable of delivery, to the party entitled thereto, as directed by the consignee, within a reasonable time at the very place agreed upon, and in the only manner practicable. Nothing more could have been done."

Denver & R. G. R. Co. v. *Johnson,* ..... Colo....., 193 Pac. 729 (Advance Sheets of January 10, 1921), was an action for damages for the destruction by fire of certain hardware in a freight car. It was admitted that the railroad was guilty of no negligence, but plaintiff sought recovery on the ground that defendant was liable as a common carrier. The car had arrived and been spotted at a convenient place for unloading after 6:00 P. M., July 2nd. At 9:00 A. M., July 3rd, consignee was notified, broke the seal of the car and unloaded one wagonload therefrom. During the afternoon of July 3rd, consignee closed and locked the car. At 2:00 P. M., July 4th, the car and contents were destroyed by fire. The court said:

> "The plaintiffs rely upon the rule that the extraordinary liability of the carrier continues until the consignee has had a reasonable time in which to remove the goods. This ruling, however, is usually applied in cases where the shipment, on its arrival at destination, is awaiting delivery to the consignee. In 10 C. J. 235, the rule is discussed under the heading: 'Custody Awaiting Delivery to Consignee.' In *D. & R. G.* v. *Peterson,* 30 Colo. 77, 69 Pac. 578, cited by plaintiff, the goods were awaiting delivery at the time of the destruction by fire. * * *
>
> As to the hardware in the car, the plaintiffs assumed control of same. They had broken the seal and entered the car before the fire occurred. This shows final delivery. 1 Moore on Carriers, p. 200. After completion of the contract of carriage and complete delivery to and acceptance by the consignee, the common carrier is not liable, as such, for loss or injury to the shipment thereafter occurring. 10 C. J. 274, Sec. 350; 4 R. C. L. 759, Sec. 226. A headnote in the Pac. Rep. to the opinion of the court in *Lynch* v. *Union Pac. R. Co.* 65 Colo. 152, 172 Pac. 1062, reads as follows: 'Where railway delivers a carload of vegetables to consignee, who accepts same and starts removing vegetables from the car, the railway's responsibility for the safety of the vege-

> tables ceases; and, where vegetables remaining in car freeze, the railway is not liable for damages sustained.' Upon the principles announced or applied in the authorities above cited, the defendant in the instant case is not liable, and it was error to render judgment for plaintiffs."

In *State* v. *Intoxicating Liquors,* 106 Me. 138, 76 Atl. 265, the action was to seize certain liquor. It had arrived at destination, the bill of lading had been surrendered, a receipt given for the whole shipment and all but 10 cases taken away. Under these facts the court held:

> "Not finding any decision of that court to the contrary upon facts like those in this case, we think, for the reasons above given we should hold that the transit was ended, that the liquors had come into the possession of the consignee at the time of the seizure and were then subject to seizure and forfeiture under the state law."

In *Lewis* v. *N. Y. O. & W. R. Co.* 210 N. Y. 21, 104 N. E. 944, the plaintiff had been injured while unloading a carload of hay on defendant's sidetrack and had sued the carrier. In passing on the case the court said:

> "If the consignee undertakes to unload the car, which is switched for convenience on a sidetrack in his yard, the carrier's function ends, and delivery is complete when the car is thus placed in the custody of the consignee."

In *Anthony et al.* v. *N. Y. C. & H. R. R. Co.* 223 N. Y. 21, 119 N. E. 90, the court thus stated the principle of delivery of carload freight:

> "The placing of the car upon the public team track, in order that the plaintiff should unload it, concurred in and acted upon by the plaintiff, was a completed delivery, and terminated the undertaking and obligation of the defendant as a common carrier."

The facts in the case at bar more completely support the argument that delivery of the shipments sued on had been made before the losses complained of occurred than

do the facts in most of the cases we have cited. It is true that all the property had not been unloaded from these cars prior to the time the losses occurred but this should make no difference. If the respondent, to suit its own convenience or for any other reason, allowed any part of this property to remain in the car after it had assumed sole control and jurisdiction over such property by accepting it, and during this time a loss occurred, there is certainly no justice or equity in requiring petitioner to answer therefor. We submit that under the law and in justice to petitioner, it should be held that delivery of these shipments had been made and that the losses in this case should fall on the party responsible which was the respondent.

The most that can be said from respondent's viewpoint, under the facts in this case is that the liability of petitioner was that of a warehouseman, but even were this the status of petitioner at the time of the losses, there is still no right of recovery in respondent. The manner or cause of these losses is unknown. The only thing that is clear is that they occurred sometime between the time the unloading was started and the time it was completed. If petitioner were even liable as warehouseman, the burden was on respondent to prove its negligence before there could be a recovery.

In *United Metals Selling Co.* v. *Pryor*, 243 Fed. 91, the action was to recover from the carrier for certain property lost while it was holding it as a warehouseman. The Circuit Court of Appeals, referring to the allegations of the petition, said at page 98:

> "But that is not sufficient to enable the appellant to recover in the absence of proof by it of the negligence it charges against the railroad company whereby the copper was lost from the car. The appellant, however, maintains in argument that, hav-

> ing shown the loss of the copper from the car (or other grounds from which it might be inferred that it was stolen from the car); a *prima facie* case of negligence is shown against the defendant and that the burden then shifts to it to show its freedom from negligence, and cases from certain of the state courts including Missouri are cited in support of this contention. But an equal or greater number of decisions from the courts of other states may be cited to the contrary. * * * There is no evidence that the car or the seal upon the west door thereof were insufficient in any respect; and the inference that the seal was broken and the copper stolen from the car was not sufficient to warrant a finding that the copper was lost because of any neglect or want of ordinary care upon the part of the railroad company as warehouseman."

On this point we also refer the court to the case of *Southern Railway Company* v. *Prescott,* 240 U. S. 632.

In making our argument under this point, we do not lose sight of the fact that this court has passed on cases, which are in some ways related to this one. These cases, however, are not decisive of this issue. In *C. C. C. & St. L. R. Co.* v. *Dettlebach,* 239 U. S. 588, it was not disputed that the carrier was liable as a warehouseman and on page 591 of the decision is the statement of fact that the goods were not called for by the consignee and remained in defendant's possession as warehouseman. In the case at bar, the goods were not in petitioner's possession after their acceptance by respondent and the starting of the unloading.

In *Southern Railway Co.* v. *Prescott,* 240 U. S. 632, the situation was substantially the same as in the Dettlebach case, *supra.* There was no denial of the fact that the liability of the carrier was that of a warehouseman, and on page 636 it is stated that there is no dispute as to the fact that the nine boxes had remained in the possession of the carrier. These facts distinguish the case

from the one at bar. Both the Dettlebach and Prescott cases, *supra,* support our theory of this case that in no event did the liability of petitioner at the time the losses occurred exceed that of a warehouseman, which would impose upon respondent the burden of proving the negligence of petitioner as the cause of the losses. In the case of *Erie R. R. Co.* v. *Shuart,* 250 U. S. 465, the fact was that the unloading had not been started. The horses were still in the car and only half an hour had elapsed between the time the consignee took charge of them and the time the accident occurred. The majority opinion says:

> "The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the work of actual removal."

This illustrates the distinction between the liability of a carrier as such, in the case of live stock and in the case of dead freight in carloads, as in the case at bar. In the case of dead freight in carloads, there is no obligation on a carrier to furnish facilities for unloading nor opportunity to use them, the duty being on a consignee to perform this service without assistance from the carrier. All the cases we have cited so hold, and there are practically no decisions to the contrary.

IV.

EVEN UNDER THE CONSTRUCTION PLACED BY THE SUPREME COURT OF ILLINOIS ON SECTION FIVE OF THE BILLS OF LADING SUED ON HEREIN, THE JUDGMENT OF THAT COURT IS ERRONEOUS AS TO THREE OF THE SHIPMENTS INVOLVED.

The contention of respondent throughout the course of this litigation has been that the bill of lading contracts were valid; that that portion of Section 5 which

provides that after the expiration of 48 hours the liability of the carrier shall be that of warehouseman only as to property not removed, was binding on the parties, and that under this provision petitioner's liability as carrier extended throughout the 48-hour period. The Supreme Court of Illinois sustained this proposition, apparently assuming that each car was unloaded within the 48-hour period. This, however, is not the fact. In the case of three of the cars, respondent consumed more than 48 hours following the placement of the cars and notice thereof to it, in completing the unloading. (Trans., 12.)

In its decision herein, the Supreme Court of Illinois upheld the validity of Section 5 of the bills of lading, and based its conclusions on what we claim is an erroneous construction thereof. In the same decision, however, it impliedly holds the clause not to be good, by holding petitioner to its carrier liability in the case of three of the cars for periods in excess of 48 hours after arrival and notice. There is nothing in the record in this case to indicate when or how the losses occurred. There is nothing in the record to indicate that the losses in the case of the three cars referred to did not occur subsequent to the expiration of the 48-hour period. If this were the fact, then under the very construction placed upon the provision by the Supreme Court of Illinois and on the authority of that court's holding as to the validity of the clause, the judgment herein cannot be sustained.

The burden was on respondent to prove its case. In the statement of claim filed in the Municipal Court of Chicago, which was the only pleading in the case, petitioner is alleged to be liable as a common carrier, but there was no proof that it was liable as such at the time the losses occurred.

If, as a matter of fact, the losses in the case of the three cars, occurred after the expiration of the 48-hour period, and if Section 5 of the bills of lading is valid, as held by the Supreme Court of Illinois, then the burden of proving petitioner's negligence was on respondent. *United Metals Selling Co.* v. *Pryor et al., supra.* If, on the other hand, respondent contends that petitioner was liable as a carrier, as alleged in the statement of claim, then the burden was on it to prove that the loss occurred within the 48-hour period, even under the construction placed by the Supreme Court of Illinois on Section 5 of the bills of lading. In neither case has the necessary proof been made. Assuming, for the argument, that Section 5 of the bills of lading is invalid, then respondent, in the case of all the cars, is remitted to his rights under the Illinois law as declared by the Illinois courts, which have held uniformly that under such circumstances as obtained in this case, a carrier's liability does not exceed that of warehouseman. *Gratiot Street Warehouse Co.* v. *St. Louis, etc. R. Co.* 221 Ill. 418; *I. C. R. Co.* v. *Carter,* 165 Ill. 570; *Gregg* v. *I. C. R. Co.* 147 Ill. 550. We, of course, maintain that Section 5 of the bills of lading is valid, but no matter what conclusion is reached on this point, the judgment in the case at bar cannot stand. And in any event, the opinion of the Supreme Court of Illinois is erroneous, for it denies the validity of Section 5 in order to affirm the judgment, after sustaining its validity for the purpose of construing the language used.

Conclusion.

The amount involved in this case is insignificant, but the principle on which the judgment of the state courts is based is of vital importance, and on its final determination will depend the liability in a great number of similar claims. Also, if the decision of the Supreme Court of Illinois is to stand, the practice now followed by petitioner on its various team tracks will have to be entirely changed and the same will also be true of other carriers under like circumstances. Not only will a common carrier be called upon to perform the duty it contracts to perform, but it will also be called upon to perform an additional duty, if the inability of a consignee to unload makes the performance of such a duty necessary. It will also not only be called upon to insure the honesty of its own employees over which it has, theoretically at least, some jurisdiction, but will also be called upon to insure the honesty of employees of consignees over which employees it has no jurisdiction whatsoever. We do not believe the law and the language of that provision of the bills of lading now in question, can be so twisted as to bring about this result. The burden of a common carrier is indeed great, but there is certainly a limit to it somewhere and we submit that that limit has been reached, when, as in this case, a consignee, by its own action, entirely relieves a carrier from any obligation to perform any duty whatsoever with reference to a shipment. We cannot understand the justice of the position of the respondent here in first assuming sole control over this property and thereafter requiring petitioner to make good losses which may have occurred as a result of the inefficiency or dishonesty of its own employees.

Aside from this point, however, the judgment of the Supreme Court of Illinois cannot stand in any event, for the reasons given under Point IV herein. We submit that the judgment of that court should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

FRANK H. TOWNER,
Of Counsel.

MAR 5 1921
JAMES D. MAHER,

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

NO. 299

MICHIGAN CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

MARK OWEN & COMPANY,
Respondent.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

WILLIAM B. MOULTON,
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BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This case has been heard by three courts. In this Court for the first time the petitioner points out that the unloading of three of the four cars involved was not completed within forty-eight hours after notice of arrival. In each hearing it was assumed by Court and counsel that every car had been unloaded within the forty-eight hour period. The trial court held in a proposition of

law that all the cars were unloaded within a reasonable time, and that holding was not questioned by the petitioner. (Trans., 16.) The Appellate Court of Illinois found that every car was unloaded within the forty-eight hour period and this finding remained unchallenged by the petitioner in the Supreme Court of Illinois. The contention of the respondent herein is that under Sections 1 and 5 of the Bills of Lading covering these shipments the liability of the petitioner continued that of a common carrier as to goods not removed within forty-eight hours after placement and notice of arrival. No such contention is made as to goods not removed after the forty-eight hour period. In order to simplify the issue, the respondent waives any claim to the losses on cars Nos. 28732, 102566 and 5586, respectively, and confines its claim to car No. 22049. Car No. 22049 was unloaded within nine hours after placement and notice of arrival. (Trans., 12.) The loss on this car amounted to 31 baskets of grapes the value of which was $8.68. (Trans., 11-13.) As to this sum the respondent asks that the judgment of the Supreme Court of Illinois be affirmed.

BRIEF.

I.

Under Sections one and five of the Bill of Lading covering the shipment in car No. 22049 the liability of the petitioner continued for a forty-eight hour period after placement and notice thereof to the respondent.

The Bill of Lading having been prepared by the petitioner, Sections 1 and 5 should be construed most strongly against it.

Texas & Pacific Ry. Co. v. *Reiss*, 183 U. S. 621.
Lehigh Valley Transportation Co. v. *Post Sugar Co.*, 128 Ill. App. 600.
10 Corpus Juris 181.

The contention of the petitioner as to delivery in this case is without value, in view of the words used in Section 5 of the Bill of Lading.

Gary Bros. etc. v. *C. M. & P. S. Ry. Co.*, 49 Mont. 524; 143 Pac. 955.
Rustad v. *Great Northern Ry. Co.*, 122 Minn. 453; 142 N. W. 727.
Mark Owen & Co. v. *Michigan Central R. R. Co.*, 291 Ill. 149; 125 N. E. 767.
Mark Owen & Co. v. *Michigan Central R. R. Co.*, 214 Ill. App. 94.

II.

The allowance of forty-eight hours for the removal of the goods by Sections 1 and 5 of the Bill of Lading was only a recognition of the allowance of a reasonable time to unload, theretofore given the consignee.

Before the approval of the form of the Bill of Lading in the present case, by the Interstate Commerce Commission, the consignee had a right recognized by the courts to a reasonable time after placement and notice in which to unload, during which the liability of the carrier continued that of a common carrier.

J. J. Jackson & Sons v. *New York Central R. R. Co.*, 167 Ill. App. 461.

Schumacher v. *C. & N. W. Ry. Co.*, 207 Ill. 199; 69 N. E. 825.

Hutchinson on Carriers, 3d Ed., Secs. 707, 713.

That this doctrine is a reasonable one is further evidenced by the holding in a majority of the states that a consignee has a reasonable time to remove the goods even after they are actually warehoused.

Moses v. *Boston, etc. R. Co.*, 32 N. H. 523; 64 Am. D. 381.

Porter v. *Rock Island R. R. Co.*, 20 Ill. 407.

Bowdon v. *Atlantic Coast Line R. R. Co.*, 148 Ala. 29; 41 So. 294.

Missouri, etc. R. Co. v. *Pullen*, 90 Ark. 182; 118 S. W. 702.

Lewis v. *Louisville, etc. R. Co.*, 135 Ky. 361; 122 S. W. 184.

Sleade v. *Payne*, 14 La. Ann. 453.

United Fruit Co. v. *New York, etc. Transport Co.*, 104 Md. 567; 65 Atl. 415.

Walters v. *Detroit United R. Co.*, 139 Mich. 303; 102 N. W. 745.
Yazoo, etc. R. Co. v. *Blum*, 102 Miss. 303; 59 So. 92.
Scott Milling Co. v. *St. Louis, etc. R. Co.*, 127 Mo. App. 80; 104 S. W. 924.
Faulkner v. *Hart*, 82 N. Y. 413; 37 Am. R. 574.
Burr v. *Adams Express Co.*, 71 N. J. L. 263; 58 Atl. 609.
Poythress v. *Durham, etc. R. Co.*, 148 N. C. 391; 62 S. E. 515.
Lake Erie, etc. R. Co. v. *Hatch*, 52 Ohio St. 408; 39 N. E. 1042.
Bristow v. *Atlantic Coast L. R. Co.*, 72 S. C. 43; 51 S. E. 529.
Ouimit v. *Henshaw*, 35 Vt. 605; 84 Am. D. 646.
Wood v. *Crocker*, 18 Wis. 345.
Backhaus v. *Chgo. & N. W. Ry. Co.*, 92 Wis. 393; 66 N. W. 400.

That forty-eight hours was a reasonable time in which to unload, was recognized by the petitioner railroad in its rules in force at the time the shipment in question was made.

RULE 2—FREE TIME ALLOWED.

(*a*) Forty-eight hours (two days) free time will be allowed for unloading or loading on all commodities. (Trans., 13.)

ARGUMENT.

I.

Under sections one and five of the bill of lading covering the shipment in car No. 22049 the liability of the petitioner continued for a forty-eight hour period after placement and notice thereof to the respondent.

If placement and notice terminated the petitioner's liability as a common carrier, as contended by the petitioner herein, then why was it necessary for it to contract with the respondent that its liability as a common carrier should not "extend *beyond* a period of forty-eight hours after placement and notice?" (Trans., 15.) Not only are the provisions of the bill of lading cited herein an admission that petitioner's liability as a common carrier continued for forty-eight hours after placement and notice, but by its wording petitioner expressly stipulates that it shall so continue. No other reasonable construction seems possible. If the various constructions contended for by the petitioner are intended, then it failed to insert in the contract many important modifications of a very clearly expressed liability. Certainly the respondent who did not prepare the instrument should not be held to the modifications read into these provisions by the petitioner who did prepare it.

The Bill of Lading having been prepared by the petitioner, Sections 1 and 5 should be construed most strongly against it. The rule by which bills of lading must be interpreted is stated as follows:

Mr. Justice Peckham, in *Texas and Pacific Ry. Co.* v. *Reiss*, 183 U. S. 621, on p. 626, said:

> "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liability, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in *Kansas City Bank* v. *Hartford Ins. Co.*, 95 U. S. 673, 79, both reasonable and just that its own words should be construed most strongly against itself. * * *"

To the same effect, see:

Lehigh Valley Transportation Co. v. *Post Sugar Co.*, 128 Ill. App. 600.

10 Corpus Juris, 181.

As stated by petitioner there are but four courts that have construed these sections of the bill of lading other than the Supreme and Appellate Courts of Illinois, both of the latter courts sustaining the contention of the respondent herein. Of the four decisions referred to, two are cited by the petitioner as sustaining its construction, while two of these four sustain the construction of the respondent.

In *McEntire* v. *Chicago, etc. Ry. Co.*, 98 Neb. 92; 152 N. W. 305, the pertinent point of the decision lay in the fact that the consignee locked the door of the car and retained the key. In this connection it was said on p. 307:

> " * * * and the consignee, by breaking the seal and locking the door with its own lock, and retaining the key, assumed control and dominion, and the transfer and delivery was complete."

In *Southern R. Co.* v. *Barclay*, 56 So. 26, the effect of the locking of a car door by the consignee as in the *McEntire case* is pointed out by the Court, p. 27:

> "If, thereafter, any one for the carrier had desired to protect the contents from the damage from rain to which they were exposed by reason of the leaky condition of the roof of the car, entrance to the car would have been prevented by the precaution taken by the consignee to maintain his own control of the situation."

In the present case, of course, the respondent did not lock the car door and the petitioner had every opportunity to protect the shipment from loss.

The case of *G. T. & W. R. Co.* v. *Glinski*, (Ind. App.); 125 N. E. 53, cited by the petitioner, there was a conflict in the evidence between the testimony of the consignee and that of the agent of the carrier as to what happened after placement and notice. The Court held that the question of delivery should have been submitted to the jury and if there had been a delivery the carrier would not have been liable as such during the 48-hour period. No reasons are given and no discussion is made by the Court as to the effect of the wording of Sections 1 and 5 of the Bill of Lading. No consideration is given to the use of the word "removed" in Section 5 instead of "delivered."

In *Gary Bros., etc.* v. *C. M. & P. S. Ry. Co.*, 49 Mont. 524; 143 Pac. 955, these same provisions of the standard bill of lading came before the Court for construction, the case involving the same questions as the present case. In this case a shipment of potatoes arrived at Butte on the morning of October 26th and was placed upon the team track customarily used. Notice of arrival was sent the consignee at noon, and in the afternoon he inspected the cars. That night, and before the consignee had unloaded the cars, the potatoes were frozen. The

railroad was held liable as a common carrier, despite the fact that by a state statute in Montana the liability of the carrier became changed to that of a warehouseman upon giving notice to the consignee. These same provisions of the bill of lading as in the present case were held to be a part of the contract of shipment and to waive the provisions of the statute. The Court held on p. 957:

> "In other words the contract itself not only fixes the liability of the carrier, but defines the character of delivery which will suffice to avoid it. Confessedly, the proof shows no such delivery on October 26th. Whatever, in the absence of the contract, might have been the effect of the circumstances disclosed by the evidence, there was no removal of the potatoes before they were frozen. The appellant (carrier) having undertaken to answer for their safety under its liability as carrier until they were removed within forty-eight hours, cannot now invoke the aid of any other rule."

To the same effect is the decision of the Court in *Rustad* v. *Great Northern Ry. Co.*, 122 Minn. 453; 142 N. W. 727.

The contention of the petitioner as to delivery in this case is without value, in view of the words used in Section 5 of the bill of lading. This was pointed out by the Appellate Court of Illinois in this case, *Mark Owen & Co.* v. *Michigan Central R. R. Co.*, 214 Ill. App. 94, wherein the Court said, p. 98:

> "Section 5 by its terms is limited to 'Property not removed.' The use of the word 'removed' instead of the word 'delivered,' in view of the previous hopeless conflict in the authorities as to what facts would or would not constitute delivery, was evidently not accidental. We think the plain meaning of the contract is that the common law liability of the carrier continues for forty-eight hours after placement and notice with respect to such part of the shipment as has not been removed."

On appeal this was again emphasized by the Supreme Court of Illinois in *Mark Owen & Co.* v. *Michigan Central R. R. Co.*, 291 Ill. 149; 125 N. E. 767, where on p. 768 it said:

> "Section 5 says as to property 'not removed' within forty-eight hours after notice—not property 'not delivered' within that time—may be kept in car, depot or place of delivery of the carrier, subject to a reasonable charge for storage and the carrier's liability as warehouseman, only, or, at the option of the carrier, it may be stored in a warehouse at the cost and risk of the owner, without liability on the part of the carrier, subject to a lien for freight and storage charges."

In *Gary Bros., etc.* v. *C. M. & P. S. Ry. Co.*, 49 Mont. 524; 143 Pac. 955, in which the same provisions of the Bill of Lading were construed, the Court said, p. 957:

> "In other words the contract itself not only fixes the liability of the carrier, but defines the character of delivery which will suffice to avoid it."

Authorities cited by petitioner on its liability as warehouseman.

The petitioner, notwithstanding, cites and quotes from a list of cases to support its contention of a complete delivery and consequent freedom from liability as a common carrier. In none of these decisions, of course, is there considered the effect of Sections 1 and 5 of the Bill of Lading. An analysis of these cases, moreover, shows the following:

In *Barclay* v. *Southern R. Co.*, 6 Ala. App. 502; 60 So. 479, the Court gives the following reasons why the carrier was relieved from further liability as a common carrier:

> "The consignee had accepted the goods, and they

were in his sole custody under lock and key, and the defendant did not even have access to them, and was not afforded the opportunity to protect them from the injury complained of, had it undertaken to do so."

Southern Ry. Co. v. *Barclay*, 1 Ala. App. 348; 56 So. 26—the same facts and reasons as in *Barclay* v. *Southern Ry. Co.* above.

Vaughan v. *N. Y., etc. R. Co.*, 27 R. I. 235; 61 Atl. 695. The consignee locked the car door; also the Court held the carrier not liable either as carrier or warehouseman since the cars had been placed on the spur track of the consignee and not on a public delivery team track.

Texas, etc., R. Co. v. *Robertson* (Tex.); 143 S. W. 708—The consignee sealed the car up on his own account and entered into an agreement with the railroad company to use the car as a warehouse and to pay demurrage for the same.

Denver & R. G. R. Co. v. *Johnson* (Colo.); 193 Pac. 729—The consignee locked the car door with his own lock.

Rothschild v. *N. P. R. Co.*, 68 Wash. 527; 123 Pac. 1011. In this case a carload of spirits arrived in a dangerous condition, and consignee with full knowledge of this condition and of the hazard accepted the car, and when he opened the door and proceeded to unload, the car burst into flames and was destroyed. The Court held under the facts that whether the railroad defendant was liable as a carrier or as a warehouseman was an "immaterial question" but when the consignee "consented to receive it after being made aware of the unsafe condition, it waived its rights to insist upon a delivery in proper condition, and took upon itself the risk of loss of the property arising from the act of removing it in its unsafe condition."

Chicago, etc. R. Co. v. *Kelm*, 121 Minn. 343; 141 N. W. 295. Two carloads of hay transported by defendant carrier were ordered by the consignee to be turned over to the Northern Pacific to be carried by the latter to its industrial track adjacent to consignee's warehouse. The Court held the defendant's liability terminated when it had complied with consignee's request and delivered the cars to the Northern Pacific. The defendant carrier could not protect the car after delivery on the industrial track without becoming a trespasser, and certainly should not be held under the facts.

Gratiot St. Warehouse Co. v. *St. L., etc. R. Co.*, 221 Ill. 418; 77 N. E. 675. This was an action to recover damages on account of deterioration in eleven cars of corn, which stood for three weeks during the hot weather in cars on the sidetrack, after arrival at destination. Notice of arrival had been sent within twenty-four hours, and on inspection by the person to whom notice was sent the contents of the cars were found in good condition. The damage was caused, of course, by the long exposure to the hot weather. This decision we believe is correct, since the consignee failed to remove the contents of the cars within a reasonable time after notice, and the railroad's responsibility as a carrier had terminated. This is in accord with the respondent's contention in the case at bar.

In the following cases there was no controversy as to loss or damage to property, and with one exception, no controversy between the carrier and consignee.

The questions involved were as follows:

Lewis v. *N. Y. O. & W. Ry. Co.*, 210 N. Y. 21; 104 N. E. 944.—Whether the carrier was liable for negligent loading by the consignor whereby an employe of the consignee was injured by a bale of hay falling on him when the car door was opened, was the question here decided.

Levers v. *A. T. & S. F. Ry. Co.*, 22 N. M. 599; 166 Pac. 1178.—A suit by the consignor against the carrier in which the question of delivery became material.

State v. *Intoxicating Liquors*, 106 Me. 138; 76 Atl. 265.—Whether the character of a shipment of liquor as an interstate shipment had ended so that it could be seized by the local authorities.

Anchor Mill Co. v. *B. C. R. & N. R. Co.*, 102 Ia. 262; 71 N. W. 255.—Whether the holder of a bill of lading or the consignee was entitled to possession of certain wheat.

Anthony et al v. *N. Y. C. & H. R. R. Co.*, 223 N. Y. 21; 119 N. E. 90.—Whether carrier after placing car on public team track and after part was unloaded was obliged to transport to lines of another carrier at the request of the consignee, where there was no tariff for the transportation.

Brooks Mfg. Co. v. *Southern R. Co.*, 152 N. C. 665; 68 S. E. 243.—A suit to recover a statutory penalty for delay.

In *Kenny Company* v. *A. & W. P. R. Co.*, 122 Ga. 365; 50 S. E. 132.—The loss complained of occurred over forty-eight hours after placement and notice, but there was no consideration of any provisions of a Bill of Lading such as are involved in the present case. The Court apparently allowed no time to the consignee to unload.

P. C. & St. L. R. Co. v. *Nash*, 43 Ind. 423. Taking the quotation of the petitioner in its brief, p. 25, at its face value, it would not be applicable to the facts of the present case, since the goods here involved could be warehoused and by the rules of the petitioner in force at the time of these shipments it was obliged to unload at the car door. (Trans., 15.)

Whitney Co. v. *R. & D. R. Co.*, 38 S. C. 365; 17 S. E. 147. In this case the cars were delivered to the "Whitney

switch" which was in reality the private switch track of the consignee and by agreement between consignee and carrier the latter was not to guard the cars.

We do not agree with the contention of the petitioner that under the construction of the Supreme Court of Illinois "a carrier would be liable as such for loss or damage to a carload shipment on a private track of a consignee on his property and under his exclusive control." In such a case the carrier would not be held, since it could not enter on the private property of the consignee to police and protect either the car or its contents. A carrier should not be held to the responsibility of protecting a consignee's goods from fire or theft, when to do so, it would have to constitute itself a trespasser.

In this connection we believe the Court can take judicial notice that in the City of Chicago the public delivery team tracks are a part of the great yard system of a railroad and under its control and care. Anyone who enters upon this property without the permission of the railroad is a trespasser. On the other hand, the railroad can protect the car and its contents from theft and fire and can employ watchmen in sufficient force to thoroughly police these team tracks. If the theory of the petitioner, that its liability as a common carrier terminates after placement on one of its public delivery team tracks and notice to consignee, is correct, then it would be incumbent upon every consignee in the City of Chicago upon receiving notice, to hasten to the yards of the railroad and guard his cars until the unloading could be completed, whether the time be day or night, and in so doing he would make himself liable for trespassing on the railroad property. The unreasonableness of such a rule is apparent, and certainly such a system would be impracticable.

II.

The allowance of forty-eight hours for the removal of the goods by Sections 1 and 5 of the Bill of Lading was only a recognition of the allowance of a reasonable time to unload, theretofore given the consignee.

Before the approval of the form of the Bill of Lading in the present case by the Interstate Commerce Commission, the consignee had a right recognized by the Courts, to a reasonable time after placement and notice in which to unload, during which the liability of the carrier continued that of a common carrier.

In *J. J. Jackson & Sons* v. *New York Central R. R. Co.*, 167 Ill. App. 461, the Court said:

> "The defendants in error were not bound to deliver the apples to the consignee at its place of business in the absence of a contract or custom to do so; but they were bound to notify the consignee of the arrival of the apples and to place them on their tracks or other proper place where the consignee could take them. Until they did so their stringent liability as common carriers continued. The consignee upon such notice and delivery was bound to remove the apples within a reasonable time. *From the time that the consignee had notice of the arrival of the apples and a reasonable time had elapsed for their removal,* they were at the risk of the plaintiffs in error * * *."

In *Schumacher* v. *C. & N. W. Ry. Co.*, 207 Ill. 199; 69 N. E. 825, the Court again recognized this right when it said, on p. 827:

> "Railroads, as to freights committed to their charge, during the period of transport and until they are delivered, bear two well recognized relations. While in transit, and for a reasonable time after reaching the point of destination, they owe the duties and bear the relation of common carriers; and when

> the car containing the freight is delivered to the consignee upon his own track or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, *with reasonable and proper opportunity to the consignee to take the same*, or when placed in the warehouse of such company or the warehouse of another selected by them, in any and all such cases such companies then bear to such freight the relation of warehousemen."

See also Hutchinson on Carriers, 3rd Ed., Sec. 707, 8, 11.

That this doctrine is a reasonable one is further evidenced by the holding in a majority of the states that a consignee has a reasonable time to remove the goods even after they are actually warehoused.

In *Moses* v. *Boston, etc., R. Co.*, 32 N. H. 523; 64 Am. D. 381, the leading case for this doctrine, the Court says:

> "If purloined, destroyed, or damaged by their fraud or neglect, subsequently to their removal and before he can have had the opportunity to come for them, he is left to precisely the same proof as if the larceny or injury had occurred while they were actually *in transitu*—the declarations of the servants of the company—they having, it may well be supposed, feelings and interests adverse to him, and knowing that he has no evidence at command from other sources to impeach their statement. It is obvious, too, that the opportunities and facilities for embezzling the goods and for other fraudulent or collusive practices must continue to be equally tempting after their removal under such circumstances as before."

In *Porter* v. *Rock Island R. R. Co.*, 20 Ill. 407, the Court said on page 410:

> "To hold that they were thus relieved from the liability of carriers, would be to leave the owner to contend with the same difficulties in showing theft,

embezzlement, or loss by negligence by the carriers, their agents and servants, that he would have had at any time after they were first placed upon the road."

To the same effect is:

Bowdon v. *Atlantic Coast Line R. R. Co.*, 148 Ala. 29; 41 So. 294.

Missouri, etc. R. Co. v. *Pullen*, 90 Ark. 182; 118 S. W. 702.

Lewis v. *Louisville, etc. R. Co.*, 135 Ky. 361; 122 S. W. 184.

Sleade v. *Payne*, 14 La. Ann. 453.

United Fruit Co. v. *New York, etc. Transport Co.*, 104 Md. 567; 65 Atl. 415.

Walters v. *Detroit United R. Co.*, 139 Mich. 303; 102 N. W. 745.

Yazoo, etc. R. Co. v. *Blum*, 102 Miss. 303; 59 So. 92.

Scott Milling Co. v. *St. Louis, etc. R. Co.*, 127 Mo. App. 80; 104 S. W. 924.

Faulkner v. *Hart*, 82 N. Y. 413; 37 Am. R. 574.

Burr v. *Adams Express Co.*, 71 N. J. L. 263; 58 Atl. 609.

Poythress v. *Durham, etc. R. Co.*, 148 N. C. 391; 62 S. E. 515.

Lake Erie, etc. R. Co. v. *Hatch*, 52 Ohio St. 408; 39 N. E. 1042.

Bristow v. *Atlantic Coast L. R. Co.*, 72 S. C. 43; 51 S. E. 529.

Ouimit v. *Henshaw*, 35 Vt. 605; 84 Am. D. 646.

Wood v. *Crocker*, 18 Wis. 345.

Bachus v. *Chgo. & N. W. Ry. Co.*, 92 Wis. 393; 66 N. W. 400.

That forty-eight hours was a reasonable time in which to unload was recognized by the petitioner railroad in its rules in force at the time the shipment in question was made.

RULE 2. FREE TIME ALLOWED.

(a) Forty-eight hours (two days) free time will be allowed for unloading or loading on all commodities. (Trans., 13.)

In the decision appealed from in the present case the Supreme Court of Illinois said:

> "* * * it is not disputed that forty-eight hours was a reasonable time for appellee to unload the cars."

CONCLUSION.

The provisions of Sections 1 and 5 of the Bill of Lading are perfectly plain. If there were any real or supposed hardships imposed by them on the petitioner or the other railroads, adequate conditions and limitations would have been inserted in the wording of the bill of lading, or the railroads would long ago have sought to have these provisions modified as petitioner would have them construed. The respondent did all that was required of it and removed its goods within the forty-eight hour period. It suffered a loss during this period, and for that loss petitioner is liable for $8.68.

We, therefore, contend that the decision of the Supreme Court of Illinois as to car No. 22049 be affirmed.

Respectfully submitted,

WILLIAM B. MOULTON,
JOSEPH A. BATES,
Counsel for Respondent.

owner's cost and risk, subject to a lien for the carrier's freight and other charges, the carrier remains liable *qua* carrier during the 48-hour period, pending delivery. P. 430.

2. A carload of goods, upon arrival at destination, was placed upon the railroad's public delivery track, and the consignee, having been notified, accepted the car, broke the seals thereon and proceeded to unload. *Held*, that this did not constitute a delivery of the goods and that a loss of part, occurring during the unloading and within the 48-hour period provided in the bill of lading *ut supra*, par. 1, must be borne by the railroad. P. 431.

291 Illinois, 149, affirmed.

CERTIORARI to review a judgment of the Supreme Court of Illinois affirming a judgment for damages, rendered in favor of the present respondent by the Appellate Court of that State upon an appeal from a contrary judgment of the Municipal Court of Chicago. The facts are stated in the opinion.

Mr. Frank H. Towner, with whom *Mr. Ralph M. Shaw* was on the briefs, for petitioner.

Mr. William B. Moulton, with whom *Mr. Joseph A. Bates* was on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in the Municipal Court of Chicago for damages for loss on several shipments of grapes, four car-lots, shipped in sound and merchantable condition.

On receipt of the shipments bills of lading were issued. The total loss is alleged to have been 126 baskets of grapes of the value of $23.30. The Municipal Court found against plaintiff (respondent here, and it will be so referred to). The judgment was reversed by the Appellate Court, First District of the State, and judgment awarded respondent which was affirmed by the Supreme Court of

the State, to which an appeal was granted because the Court of Appeals considered that the case involved questions of importance "on account of principal and collateral interests" which should be passed upon by the Supreme Court.

Our review is concerned with questions of law; the facts are undisputed. It is stipulated that the cars were transported by the Railroad Company from their respective points of origin to Chicago, arriving there at different days and times of day. Upon the arrival of each car it was placed on a public delivery track of the Railroad Company and notice thereof given. Respondent accepted each car, breaking the seals thereof. And it is stipulated that, at the time respondent started to unload, each of the cars contained the number of baskets and pounds of grapes received for transportation. The loss, whatever there was, occurred after the acceptance of the cars and after their unloading had commenced, and whether the Railroad Company is liable therefor, and in what capacity liable—whether as carrier or warehouseman, or at all—is the question in the case.

The answer depends upon the construction to be given to the first paragraph of section 5 of the bill of lading. It is as follows:

"Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

Regarding the words of the section merely, they are clear enough, and present no "double sense." But controversies have arisen and judicial judgments have divided upon them. The point of the controversies has been, and is, as to the relation of the carrier to a shipment within 48 hours after notice of its arrival has been duly sent or given, and the contentions upon the point are in sharp antagonism. That of respondent is that the Railroad Company during the 48 hours is responsible as a carrier, this relation not terminating until the expiration of that time. The contention of the Railroad Company is *contra*, and that it is liable neither as carrier nor as warehouseman,—not as carrier because the shipment had been delivered and accepted—not as warehouseman because no negligence has been proved against it. The Supreme Court decided against the contentions of the Railroad Company and held it liable for loss on all of the shipments. As to three of them we may say immediately, in disposition of them, respondent withdraws any claim on account of them and confines the issue to one car which was undoubtedly unloaded within 48 hours of the notice of its arrival. There is question of the other cars.

The importance of the issue, however, still remains, although it is concerned with only 31 baskets of grapes of the value of $8.68, and the difficulty of its determination is indicated by the fact of the diversity of judicial reasoning upon a like issue in other cases. And counsel have been at pains to set the cases in opposition with approving or disapproving comment of their own.

The differences of the cases cannot be reconciled and a review of them for the purpose of selection would manifestly extend this opinion to a great length. Their outside principle is simple enough; the bill of lading is a contract between the transportation company and him who is interested in the shipment, and legal when

within the policy and edicts of the law regulating that relation.[1]

By recurring to section 5 of the bill of lading, it will be seen that it supposes a contingency and provides for its occurrence. It supposes that property may not be removed when it has reached destination, and is available for delivery, and two periods of time are provided for. One of 48 hours after notice of the arrival of the property has been sent or given. During this time there is no declaration of the relation of the Railroad Company to the property. The other period commences at the expiration of the first or 48-hour period, during which the provision is that the property is subject "to carrier's responsibility as warehouseman only." The comparison has its significance and must be accounted for. Realizing this, the Railroad Company makes a distinction. Its contention is that, where delivery has been made of the property, as it insists was true in the case at bar, the responsibility of the Railroad Company as carrier immediately ceases. If, however, it is neither delivered nor removed within 48 hours after notice of its arrival, the responsibility of the Railroad Company thereafter is that of "warehouseman only."

To the distinction and the contention based upon it the Supreme Court of the State answered that the bill of lading provides for property "not removed"—not to property "delivered" or "not delivered," and it must be taken at its word.

The answer puts too much emphasis upon the distinction between property removed and property delivered.

[1] *Texas & Pacific Ry. Co.* v. *Reiss*, 183 U. S. 621; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639; *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592; *Missouri, Kansas & Texas Ry. Co.* v. *Ward*, 244 U. S. 383; *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632; *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465.

The property here was not delivered; access was only given to it that it might be removed, and 48 hours were given for the purpose. Pending that time it was within the custody of the Railroad Company, the Company having the same relation to it that the Company acquired by its receipt and had during its transportation.

The bill of lading is definite, as we have pointed out, in its provisions and of the time at which responsibility of the Company shall be that of warehouseman, and by necessary implication, therefore, until that responsibility attaches, that of carrier exists.

All the elements of the case considered and assigned their persuasive force, we think the judgment of the Supreme Court should be and it is

Affirmed.

Mr. Justice McReynolds, dissenting:

This cause is important because of what had been said concerning section 5 of the Uniform Bill of Lading, approved and recommended by the Interstate Commerce Commission after much consideration and repeated conferences between carriers and shippers, extending through four years.

In their report, 14 I. C. C. (1908), 346, 348, 349, 350, the Commission said:

"This proposed bill of lading—for the two forms may be considered as one in what we have further to say—is submitted for adoption by the carriers and use by the shipping public with considerable confidence. It is not claimed to be perfect, and experience may develop the need of further modifications, but it represents the most intelligent and exhaustive efforts of those who undertook its preparation to agree upon a bill of lading which should be reasonably satisfactory to the railroads and the public. It is, of course, more or less a compromise between oppos-

ing interests, because on the one hand it imposes obligations of an important character which carriers have not heretofore assumed, and on the other retains exemptions to which some shippers may object, and perhaps not without substantial reason. As we are advised, it is in some respects less favorable to the shipper than the local laws or regulations of one or more states, but is more favorable to the shipper than the local laws or regulations of most of the states. On the whole, it is believed to be the best adjustment which is now practicable of a controversy of long standing which affects the business interests of the entire country. . . . The circumstances under which the work of the joint committee has been conducted and the substantial agreement on most points by the different interests concerned, to say nothing of direct assurances from representatives of the carriers, warrant us in expecting that the assenting roads will adopt the bill upon our recommendation. We therefore assume that the railroads in Official Classification territory, whose proposed action was the subject of the original investigation, will adopt and use this bill, to the extent above indicated, from and after the date named for that purpose. We shall also expect that railroad carriers subject to the act outside of Official Classification territory will adopt and use this bill of lading to the same extent and from and after the same date. There may be peculiar conditions in western and southern territory which require some modifications of or additions to this standard bill, but the desirability of uniform usage is so great and the reasons for it so obvious as to justify the expectation that carriers in western and southern territory will adopt the bill in question to the fullest extent practicable without abridging any just privileges which their shippers now enjoy."

The language in controversy was not selected by the carriers alone; they reluctantly accepted the whole in-

MICHIGAN CENTRAL RAILROAD COMPANY *v.* MARK OWEN & COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 299. Argued April 28, 1921.—Decided June 1, 1921.

1. Under a "uniform" interstate bill of lading providing that property not removed, by the party entitled to receive it, within 48 hours after the notice of its arrival, may be kept in car, depot or place of delivery of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may, at the carrier's option, be stored in a public or licensed warehouse at the

strument rather than dictated it to others. *Texas & Pacific Ry. Co.* v. *Reiss*, 183 U. S. 621, holding that doubtful provisions should be resolved in the shipper's favor, is not applicable. The agreement ought to be construed and applied as one arrived at through deliberate negotiation by intelligent parties seeking to make some definite statement or modification of common-law rules concerning their rights and liabilities.

The carrier acknowledges receipt of "the property described . . . marked, consigned and destined as indicated below, which said carrier (which word is to be understood throughout this bill of lading as meaning any person or corporation in possession of the property under the bill of lading) agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination."

Among other things, section 1 provides:

"The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided. . . . When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

Section 5 follows:

"Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or

may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The Uniform Bill does not purport to specify all rights and obligations of the parties as between themselves, but leaves these as established by law, except when and as otherwise provided. Particularly, it does not undertake to define what shall constitute delivery to the consignee.

"In order to simplify the issues the respondent" confines its claim here to losses from car No. 22049—$8.68. The parties stipulated that this car "arrived in Chicago on October 8, 1914, was placed on a public delivery team track on October 9, 1914, at 8:00 A. M. o'clock; that notice of arrival and placement of said car was given to the plaintiff herein on October 9, 1914, at 9 A. M. o'clock; that plaintiff accepted said car, broke the seals thereon, and started to unload it on October 9, 1914, at 9:30 A. M. o'clock; and that the unloading of said car was completed by the plaintiff on October 9, 1914, at 6 P. M. o'clock. . . . That at the time the plaintiff accepted and started to unload each of said cars, every car contained the same number of baskets and pounds of grapes as were received by the defendant in said car for transportation at the point of origin thereof, named herein, and that at said time the doors of each of said cars were sealed with the same seals intact as were placed on them by the defendant when it received said grapes for transportation."

The circumstances accompanying acceptance and unloading are not revealed except as above stated. Whether these suffice clearly to establish final and complete delivery of possession of the freight to the consignee may be questioned, but mere consideration of the bill cannot

solve the difficulty. If, as matter of fact, the consignee was put into actual possession of the property within forty-eight hours, it must be clear that the carrier's liability as insurer ceased when he accepted control.

What constitutes delivery by a railroad carrier sufficient to change its responsibility from insurer to warehouseman has given occasion for much difference of opinion.

The so-called New York rule, the strictest against the carrier, "is stated to be that if the consignee is present, upon the arrival of the goods, he must take them without unreasonable delay; if he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he must have a reasonable time to remove them; if he is absent, unknown or cannot be found, the carrier may store them; and if, after notice of the arrival of the goods, the consignee has had a reasonable opportunity to remove them, and does not, he cannot hold the carrier longer as an insurer." Hutchinson on Carriers, 3rd ed., § 708.

The Massachusetts rule has been thus stated: "All that could be required of railways was a safe deposit of the goods upon the platform or in the warehouse of the road at the end of the transit, to await delivery to the consignee, when he should call for them, and that from the time of such deposit, even without notice by the carrier to the consignee, the liability of the former was changed from that of common carrier to warehouseman." Hutchinson on Carriers, 3rd ed., § 702.

The New Hampshire rule continues the carrier's liability as insurer until the consignee has had a reasonable time to receive the goods after their arrival at destination. During that period "The servants of the carrier still continue in charge of them. They are equally shut off from observation and the oversight of others as when in transit; and if they are lost, damaged, or purloined, he

has no greater opportunity of ascertaining or proving by whose fault or negligence it was done, than if such loss had occurred during the transportation. Consequently, the same reasons for holding the carrier to extraordinary responsibility during the transportation of the goods exist after their arrival, at least, until the owner or consignee shall have had an opportunity to take them in charge." Hutchinson on Carriers, 3rd ed., § 704.

Undoubtedly, the Uniform Bill was prepared with the above rules in mind. It did not adopt any of them, but left the matter to which they relate for determination by the courts.

It should be noted that the bill acknowledged receipt of property "which said carrier . . . agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination." And further, that "the carrier or party *in possession* of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided."

The special purpose of section 5 was to protect the carrier by placing an extreme limit upon the time during which freight might remain with it without charge for storage; and also to define the carrier's right and obligation thereafter. The unnecessary delay incident to unloading and the undue utilization of railroad cars and warehouses by consignees for storage purposes had seriously hindered prompt movement of freight, and proper employment of equipment. This section does not purport to establish any rule of liability during the forty-eight hours, but leaves that to be determined by application of the common law to the circumstances. To say that a carrier insures for forty-eight hours although the consignee has taken actual custody of the goods would seem an absurd conclusion. And the practical impossibility of stationing an agent at every car within

a great terminal while freight is being removed by thousands of consignees and their agents—a necessary precaution if thefts or mistakes by any one of them must be prevented—makes it manifest that the Interstate Commerce Commission would not have sanctioned the responsibility now claimed and that the carriers would not have acquiesced. I cannot think there was purpose to burden carriers beyond the most stringent of the rules above referred to.

The fair inference from the facts stipulated is that the consignee received possession and control of his goods before the loss occurred. A carrier's responsibility as insurer depends upon exclusive possession and control and must cease when these end. The modified one prescribed by the Uniform Bill for goods shipped in open cars where such possession and control is difficult or impossible to maintain gives practical recognition to the real basis upon which liability rests. Here the car was opened, examined, accepted and apparently thereafter remained in charge of the consignee. Yet, it is said the delivery was not sufficient to terminate liability as insurer but that this continued because of section 5, which in plain terms refers only to removal. It must not be forgotten that we are not dealing here with a question of due care but with the absolute liability of an insurer.

It is not good reasoning to conclude that because an extreme limit is placed upon the time during which freight may remain in a car without charge, therefore the carrier's liability as an insurer continues during such time.

The Uniform Bill is in common use and the opinion of the court will be far-reaching. The subject therefore seems sufficiently important to demand an indication of the reasons which lead me to dissent.